Administrative Conference of the United States

FINAL REPORT

OF THE

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Established by President Kennedy
by Executive Order 10934, April 13, 1961

SUMMARY OF THE ACTIVITIES OF THE CONFERENCE

December 15, 1962

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FOREWORD

President Kennedy established the Administrative Conference of the United States by Executive Order 10934,[*] dated April 13, 1961. In that Order he directed the Conference to report to him prior to December 31, 1962, "summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future." The Council of the Conference construed this directive to require two reports, one concerning the activities of the present -- now past -- Conference, and the other containing suggestions for the future. The attached is the former. The latter is being separately handed to the President in the form of a letter.

[*] - [The full text of Executive Order 10934 is in Appendix I attached hereto].

I

HISTORY

Promptly after the election of 1960 President-elect Kennedy turned his attention to the problems of the regulatory agencies, and shortly after assuming office he sent to the Congress a Special Message on the subject. In the course of that Message he discussed the establishment of an Administrative Conference of the United States. He announced that he had, by Executive order, called such a conference. In this Message President Kennedy said:

> "The results of such an Administrative Conference will not be immediate but properly pursued they can be enduring. As the Judicial Conference did for the courts, it can bring a sense of unity to our administrative agencies and a desirable degree of uniformity in their procedures. The interchange of ideas and techniques that can ensue from working together on problems that upon analysis may prove to be common ones, the exchanges of experience, and the recognition of advances achieved as well as solutions found impractical, can give new life and new efficiency to the work of our administrative agencies."

The difficulties which beset the agencies had long been a matter of concern. In 1949 a Special Subcommittee of the Judiciary Committee of the House of Representatives requested the Judicial Conference of the United States "to endeavor to develop some time-saving procedures" in certain classes of cases, including those before the regulatory agencies. The Judicial Conference, through Chief Justice Vinson, suggested to the President of the United States that he call a Conference of Representatives of the Administrative Agencies for the purpose of devising ways and means of eliminating excessive delay, expense, and unduly voluminous records. President Eisenhower, early in 1953, called such a Conference, and it met for some two years. At its conclusion it recommended that a similar

Conference be put upon a continuing basis.

Thereafter the American Bar Association, the Federal Bar Association, the Judicial Conference of the District of Columbia Circuit, and, for the second time, the Judicial Conference of the United States urged the creation of such a continuing Conference. Chief Justice Warren, in a key speech to the Federal Bar Association, vigorously urged the establishment of a permanent Conference.

Finally, in August, 1960, the Chairmen of six of the large independent agencies, jointly, prepared and transmitted to President Eisenhower a letter in which the need for a permanent Conference was explained at length, the composition of such a Conference was suggested, and he was urged to appoint a Committee to formulate plans. The President appointed such a Committee. Shortly thereafter President Kennedy took office and, as we have indicated in our Foreword, promptly created the Conference by Executive Order and sent his Special Message to the Congress. The Conference thus created was directed to report to the President prior to December 31, 1962, summarizing its activities and submitting its suggestions as to means for future studies of agency procedures.

II

STRUCTURE AND ORGANIZATION

On April 30, 1961, the President announced the appointment of the Chairman of the Conference and ten other persons who were to constitute a Council, [1/] or Executive Board. The Chairman called this group together for its first meeting in Washington on May 8 and 9, 1961.

The Council determined that some 31 agencies of the Government had, as a major part of their activities, the determination of rights, privileges

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1/ For identification of the Council members, see Appendix II.

and obligations of private individuals through adjudication or by the making of rules. A majority of the membership of the Conference was therefore obtained from these 31 agencies. The Secretary of each Cabinet Department was asked to name a member. Those departments which had several agencies within their departmental structure named an additional member. Each Chairman of the 7 large independent agencies (CAB, FCC, FPC, FTC, ICC, NLRB, SEC) designated 2 members. Fourteen other agencies having adjudicatory and rulemaking functions each named a member. Later, the Council designated 2 additional Federal agencies whose heads named 1 member each, bringing the number of agencies participating to 33. The governmental agency members then totaled 46. Two hearing examiners were named.

Twenty-nine participants from outside Government service were selected, after careful deliberation and consideration of many factors. Of these, 21 were practicing lawyers, 3 were law school faculty members, 2 were from the faculties of schools of government, 2 were members of State regulatory commissions, and 1 was an accountant.

In the selections from the practicing Bar, an intensive effort was made to produce a cross-section of all shades of administrative law practice. From a list of over 100 thoroughly qualified specialists in major areas of Federal regulation, practitioners were selected who included members of small law firms and the senior partners in several of the country's leading firms. Geographic location and major clients of the practitioners were taken into account, so as to give voice to private as well as public groups. For example, in the field of transportation, the Conference was able to benefit from the participation of lawyers familiar with the problems of carriers, shippers and state regulatory agencies. A mixture of political

affiliations was sought. From the universities were obtained the services of outstanding law professors and scholars in the fields of political science and economics. All individuals invited by the Council agreed to serve.

The general membership of the Conference, including the Chairman and the Council, was 88, of whom 60% were in Government service and 40% were from outside the Government. The roster is attached hereto as Appendix III.

The Council established liaison with the Congress by inviting the President of the Senate and the Speaker of the House of Representatives each to designate three members from their respective chambers. Pursuant to this invitation, Senators Philip A. Hart, Edmund S. Muskie and Everett McKinley Dirksen were appointed from the Senate and Congressmen Oren Harris, Walter Rogers and John Bennett from the House. These designees were permitted to name alternates from their staffs.

The Conference established 9 Standing Committees:

Adjudication of Claims - Cyrus R. Vance, Secretary of the Army, Chairman

Compliance, Enforcement, and Disciplinary Proceedings - Rosel H. Hyde of the Federal Communications Commission, Chairman

Information and Education - James McI. Henderson of the Federal Trade Commission, Chairman

Internal Organization and Procedure - David Ferber of the Securities and Exchange Commission, Chairman

Judicial Review - Ashley Sellers of the firm of Cummings and Sellers, Washington, D.C., Chairman

Licenses and Authorizations - Whitney Gilliland of the Civil Aeronautics Board, Chairman

Personnel - Emmette S. Redford of the University of Texas, Chairman

Rulemaking - Robert W. Ginnane of the Interstate Commerce Commission, Chairman

Statistics and Reports - Charles W. Bucy of the Department of Agriculture, Chairman

Each member of the Conference served on one Committee, and a member of the Council was designated as a liaison with each Committee. No alternates or substitutes for members were permitted to participate in sessions of the Conference.

Government departments and agencies cooperated fully with the Committees and the Conference. The Committees were fortunate in obtaining the services of educators in leading law schools in the country, who acted as full-time staff directors and as consultants as the need appeared. In this manner expert services were obtained for research. The research directors were, of course, upon a retainer basis of employment, but members of the Council and of the Conference and most of the consultants served without compensation. Administrative and secretarial services were supplied the Conference and the Committees by the Office of Administrative Procedure of the Department of Justice.

The Conference, as a whole, operated in the form of a legislative assembly. The course of operation was: (1) A subject was suggested for study. Such suggestion might come from anywhere or anybody. (2) The Council adopted the suggestion and proposed its assignment to a Committee. (3) The assembly approved the Council assignment. (4) The Committee considered the subject and directed research into it. (5) A staff director made or directed the research and formulated the data thus accumulated into a staff report. (6) The Committee considered the staff report and prepared a recommendation of action on the subject. It formulated a report -- usually,

of course, based upon the staff report -- in support of its recommendation. These -- the Committee report and its recommendation -- were two separate documents, one somewhat extensive and the other succinct. (7) The Council considered the recommendation and passed it along to the assembly. Both the report and the recommendation were circulated to the entire membership. (8) The assembly debated the recommendation in a public plenary session and voted on it. (9) If adopted by the assembly, the recommendation was transmitted to the President. A total of 30 recommendations were adopted, covering a wide variety of matters, which are described in more detail later in this report.

III

OPERATION AND INTANGIBLE RESULTS.

In addition to its specific recommendations on phases of agency procedure, and the underlying reports, which we shall later describe, the Conference resulted in a number of important intangible benefits to Federal administrative processes generally. In order that these be appreciated, the operation of the assembly should be visualized. The session is public. Some seventy-five conferees are in the room. Officials are present from every Cabinet Department and every agency having duties of an adjudicatory or similar nature. The General Counsel of almost every agency is present. Commissioners and Board members of the larger agencies are present. The Secretary of the Army, the Chairman of the Federal Power Commission, and members of the Civil Aeronautics Board and the Federal Communications Commission are chairmen of Committees. About twenty lawyers from private practice are members. They come from different sections of the country, from New York City and San Francisco, from St. Paul and Dallas. Some are senior members of large firms, and some are from small offices. Some of them customarily represent industry or business, some public utilities, some labor organizations, some individual citizens. Some are experts in administrative law, and some are general practitioners. The General Counsel of the New York Public Service Commission and a member of the Illinois Commission are present. Law professors whose names are nationally known to the legal profession are also there, as are several outstanding authorities on the science of government. In addition to the members of the Conference, experts who have been invited by the Council or a Committee to assist in the work have the privilege of the floor. In like fashion staff members from Committees of the Senate and the House of Representatives participate.

A recommendation in respect to some feature of administrative procedure is before the Conference for discussion and action. As we have indicated, this proposal has originated in an intensive research study by an expert, has been before a committee of eight or nine members in several meetings, has passed through the Council, has been distributed, with its supporting report, to all participants in the Conference, and thus has reached the agenda of the assembly. The discussion on the floor is begun by the Chairman of the sponsoring Committee. The proposition is then opened to general debate. This is frequently long and vigorous, differing positions being vehemently maintained. The debate continues until the Conference indicates readiness to vote; upon occasion not until a later session. Then a vote is taken on the recommendation.

The intangible benefits flowing from this procedure are, principally, these:

1. Cooperative Consideration and its By-Products.

The agencies--some thirty-three of them--which normally are occupied separately with problems differing widely in factual background and in substance, are brought together for cooperative consideration of procedural matters. They discover that many such problems are mutual, that agencies other than themselves have some of the same procedural problems they have. Members from agencies widely separated bureaucratically and even geographically learn to know each other, personally and officially. They come to realize that these other agencies may have had important experiences or ideas with respect to problems similar to theirs. The chairman of one agency thus may present a Committee report concerning the procedure of another agency. A member from a department having much to do with Government contracts presents a report dealing with fair treatment of contractors.

Throughout the process -- in the Council, in the Committees, and in the assembly -- the voices of practitioners and of educators have been projected. A cross-fertilization of ideas occurs. Members become increasingly procedure conscious and transmit this state of mind to their associates. A reflex self-analysis takes place. A probing of the strengths and weaknesses of different approaches and different methods of treatment develops. The resultant consensus has the strength of the bundle which the separate fagots never had.

2. Variety of Sources of Suggestions. Suggestions of subjects for a study and recommendations for improvement come to a Conference like this from widespread and different sources. Some are originally posed by interested -- perhaps outraged -- individual citizens. Many are advanced by an agency, or a number of agencies. Some come from practicing lawyers or organized groups of lawyers. Some are drawn from Congressional studies. Some arise from students of government. Some originate in academic legal studies. Some are recurrent--even ancient--puzzles. The area potentially open to a body such as this Conference has been shown to be wide and varied.

3. Readiness to Recommend. The Conference proved that the agencies, with outside conferees, are ready, able and willing to undertake delicate and difficult tasks. It proved that they will aggressively attack their own shortcomings. Many skeptics at the Bar and elsewhere did not believe they would do so. But this Conference adopted recommendations on the delegation of decision-making which had been the subject of differences of opinion both in the Congress and between the Executive and the Congress, recommendations concerning ex parte contacts, with which Committees of the Congress have long been concerned, recommendations relating to such controversial matters as rights to counsel and to papers. It unabashedly

studied in depth the procedures of individual agencies and made suggestions in respect to them.

4. Unanimity in Basic Interest. In this Conference bloc division was not discernible between practitioners and Government personnel, or between big agencies and smaller agencies, or between departments and independent agencies. Specters of such divisions were exorcised by an all-pervading interest in the better administration of justice and better government, and by the active presence of strong personalities from many points of origin.

5. Composite Expression. Each recommendation made by this Conference represented a consensus of the views of officials designated for the task by all the agencies in this field of government, leavened by practitioners and educators. Thus for the first time the agencies have had a means by which they could speak with a common voice, express a concerted view. To officials in the upper echelons of the Executive Branch of the Government, to Committees of the Congress, and to committees and sections of the organized Bar, a Conference such as this supplies a ready means of ascertaining the composite view of the agencies concerning problems of administrative procedures. Instead of fifty or a hundred responses to an inquiry along these lines, a carefully prepared, intensively studied, publicly debated, single, concerted response is available. The Committee on Interstate and Foreign Commerce of the House has already hailed this instrument of assistance to its deliberations. 2/

We submit that these intangible results are effective factors in the cause of improving the regulatory processes of the Government, so vitally important in many phases of our national life.

2/ H. R. Rep. No. 2553, 87th Cong., 2d Sess. 10-11 (1962).

IV

SUMMARY OF RECOMMENDATIONS

Following is an informal summary of the major recommendations adopted by the Conference. For precise terms, reference should be made to the full texts which appear as Appendix IV to this Report. If legislation is required to implement a recommendation, the text so states.

Ex Parte Communications. The Conference dealt with the delicate and complex problem of ex parte communications between persons in and persons outside the Government in respect to pending cases. It concluded that a single code of behavior, applicable to all such problems in all agencies, is not feasible. The factual circumstances giving rise to the problems vary too greatly among the different agencies to be susceptible to common treatment, except in the most generalized terms. Such generalizations were deemed necessarily too vague to be helpful.

Accordingly the Conference promulgated a set of principles and recommended (Recommendation No. 16) that each agency formulate a code in its own terminology, embodying these principles, for the governance of behavior in its proceedings. The principles thus enunciated were nine in number, but the chief provisions were in the first section of the recommendation. This section related to "on-the-record" proceedings. It prohibited "unauthorized ex parte communication" between, on the one hand, parties, agents for parties, or intercedors and, on the other hand, agency personnel participating in the decision. "Ex parte communication" was defined in rather broad, sweeping phrases to include both oral and written communications, and then exceptions were noted. Generally

speaking (again we note that reference should be made to Appendix IV for precise definitions), excepted from the prohibition were requests solely with respect to status, facts of general significance to an industry (not reasonably known to be material to a pending issue), and communications authorized to be upon an ex parte basis by law, agreement, formal ruling, or practice generally known, if the communication is promptly available to all parties.

The Conference recommendation would prohibit requesting, entertaining, making or soliciting an ex parte communication. An agency official receiving a communication recognized as unauthorized would be required to transmit it (or, if oral, a written memorandum of its substance) to the Secretary of the agency, who would be required to put it in the public file and send copies to all parties. It was recommended that parties be permitted to rebut ex parte communications. For violation of the prohibitions the Conference recommended that the agency codes provide for censure, suspension, or revocation of the privilege to practice, denial of any relief, benefit or license sought, and censure, suspension or dismissal of agency personnel involved in the violation.

The Committee on Interstate and Foreign Commerce of the House of Representatives, in the Report to which we have referred, announced that it would expect all agencies subject to its legislative jurisdiction to carry out this recommendation of the Conference.

Delegation of Decisional Authority. The Conference considered the much-debated subject of delegation of decision-making authority. On the one side of the argument is the pressing need for more efficient use of time and energy of agency members and their top-level staffs. Automatic

review by agency members of all findings made and conclusions reached by hearing officers in the multitude of cases which pass through the administrative machinery is obviously time-consuming, exhausting, and, indeed, actually impossible in any realistic sense. On the other hand are the rights of the parties to agency consideration and agency decision. The Conference recommended (Recommendation No. 9) that agencies be authorized to accord administrative finality to presiding officers' initial and recommended decisions, without agency review, unless the party seeking review makes a certain showing. He would be required to demonstrate prejudicial error in the proceeding before the presiding officer, or make a reasonable showing that the subordinate decision contains (1) a finding of material fact which is clearly erroneous or (2) an erroneous conclusion of law, or (3) involves an exercise of agency discretion or (4) involves an important decision of law or policy. Further, it recommended that the agency's decision to accord or not to accord administrative finality to a presiding officer's decision be not subject to judicial review, although the presiding officer's decision, if it thus became the final decision of the agency, of course would be subject to review.

This Recommendation would also eliminate doubt as to whether an agency, if it does review an initial or recommended decision, is authorized to confine that review to specified errors and specified portions of the record.

Some detail, both affirmative and negative in nature, was necessary to effectuate the foregoing, and such details were included in the recommendation as adopted. The subject has been embodied in several

Reorganization Plans relating to specific agencies submitted by President Kennedy to the Congress.

Debarment of Contractors. In the interest of fairness in the area of procurement, the Conference recommended (Recommendation No. 29) drastic changes in procedures involving the debarment of persons or firms from Government contracting. Present practices of some agencies have permitted contracting officers to debar contractors without prior specification of reasons or opportunity to be heard, and to circulate among other agencies notice of such debarment. The result has been the so-called "black list." The Conference recommended that debarment from Government contracts be preceded by notice to all parties concerned, stating reasons, and by opportunity for a trial-type hearing before an impartial board or hearing officer; to be followed by a decision in writing, including findings, conclusions and reasons. The recommendation contained a proposed framework of procedural safeguards in some detail, relating to cases where criminal convictions or civil suits are involved and cases involving fraud, substantial lack of responsibility, or lack of integrity. It also dealt with suspensions and the terms therefor. It included provisions which would require grounds for debarment to be explicitly set forth in published regulations, showing the standards and scope of debarment in various types of contracts.

Delay in Rate-Making. The Conference began a direct attack upon the problem of delay, selecting for its first intensive consideration in this area the rate-making cases. The recommendation (No. 19) proposed the flexible employment of a variety of techniques to insure the presentation of the great bulk of the evidence in written form at early stages of the

proceeding, the prompt identification of issues on which oral hearing is necessary, the contraction of the period of time in which necessary oral hearing takes place, and the more effective and informed control of the record-building process by the hearing officer, who would therefore be enabled to issue a more useful decision. More specifically, the Conference would require that direct evidence-in-chief be submitted in advance in writing. It urges trial examiners to use conference procedures to the maximum extent possible. It urges them to limit cross-examination. And it urges the elimination of "hearing by interludes" and the adoption of continuous, uninterrupted hearing procedures. The Conference also recommended in this regard the participation of agency staff members in hearings of rate cases; and it recommended that hearing officers have access, within appropriate limits, to specialized expert assistance in analyzing the record in these cases, preparing data, etc.

Armed Services Board of Contract Appeals. Since 1949 the Armed Services Board of Contract Appeals has consisted of three semi-autonomous panels (Army, Navy, and Air Force), each with its own chairman, determining appeals from disputes arising under contracts of its particular service. Recently, with the establishment of the Defense Supply Agency, the addition of a fourth panel has been under consideration.

In order to permit better utilization of board members through greater flexibility in the assignment of cases, to avoid situations wherein one panel is heavily overloaded while another is current, and to reduce the expense of maintaining three or four separate file systems, separate dockets, and separate clerical staffs, the Conference recommended (Recommendation No. 6) that the Armed Services Board of Contract

Appeals be constituted as a unitary board in the Defense establishment. For like reasons the recommendation urged that subsidiary boards such as the Corps of Engineers Board and the Quartermaster's Board, to the extent practicable, be eliminated as soon as possible.

Competing Domestic Airline Applications. The Conference addressed itself to the perplexing problems of the consolidation and joint hearing of applications for new or modified domestic airline route authority. It recommended (Recommendation No. 20), first, that the Civil Aeronautics Board be given authority to consider competing applications by conducting separate hearings on the applications and then consolidating the proceedings for purposes of decision. This recommendation is conditioned upon certain opportunity for excluded applicants to participate in the hearings as intervenors, being allowed to present evidence and to cross-examine adverse witnesses. Further, the recommendation would give the Civil Aeronautics Board greater latitude in denying consolidation in certain circumstances and relieve it of whatever obligation may now exist to conduct a preliminary hearing on the consolidation issue. Implementation of this Recommendation would require legislation.

Mutually Exclusive Broadcast Applications. The Conference recommended (Recommendation No. 22) that the Federal Communications Commission take several steps with regard to its procedures involving mutually exclusive applications for broadcast facilities. It recommended that the Commission consider providing by general rule for the fuller development of a system of qualitative priorities under which some applicants would be automatically preferred over others, and for the selection of a licensee on other than substantive grounds, when two or more applicants are found

to be equally qualified. It recommended that the Commission re-examine the conduct of its comparative hearings with a view to clarifying and improving the criteria employed in their disposition and limiting the scope of such hearings to issues significantly relevant to effectuation of regulatory policies.

Further, the Conference recommended that the Commission be authorized to protect the integrity of any comparative selection by ascertaining through suitable procedures that a proposed transferee of the successful applicant has qualities consistent with policies reflected in the initial comparative selection.

Right to Counsel. In two recommendations (Nos. 15 and 25) the Conference dealt with the sometimes perplexing problems of the right to counsel. These actions were by way of implementing the Administrative Procedure Act (Sec. 6(a)). Specifically, the Conference proposed definitions of "accompanied," "advised" and "represented," as those terms are used in Section 6(a). It urged that counsel for persons compelled to appear in an agency proceeding be permitted broader participation in the representation of their clients, and that persons appearing by request or permission be afforded the same right to counsel as are persons compelled to appear.

Hearing Examiners and Government Attorneys. The Conference made recommendations (Recommendation No. 28) relating to agency personnel in three general areas: (1) advanced training of professional personnel, (2) status and compensation of hearing examiners, and (3) the Federal legal career service.

The Conference recommended that regulatory agencies provide for a program of advanced training for highly qualified personnel, within the agencies on a part-time basis or, in cooperation with the Civil Service Commission, through short-term training programs. Further, it suggested that a limited number of the most promising career professional staff members might be sent to universities for advanced study and research.

Several recommendations related to grades and compensation of hearing examiners authorized under the Administrative Procedure Act, and were designed to raise the calibre of these officers. These included recommendations that there be not more than two grades for hearing

examiners in the Government and only one grade in the general schedule for hearing examiners in a given agency. It was recommended that there be substantial and prompt increase in the compensation of hearing examiners.

The Conference recommended that candidates for positions as hearing examiners be evaluated on the basis of training and experience and oral and written examinations, and that lawyers of outstanding ability and experience participate in the evaluation of candidates' qualifications. Also, the register of persons eligible for appointment as hearing examiners should be unranked, and all initial appointments as hearing examiners should be made from the register. The first appointment, the Conference recommended, should be probationary.

It was recommended that agencies, perhaps through their Chief Hearing Examiners, develop techniques and conditions in which hearing examiners might have greater professional pride and better serve their agencies, and agencies should be encouraged to exchange the results of their experience in this area.

Based upon a thorough study and after extensive debate, the Conference recommended that the Civil Service Commission should continue to administer the hearing examiner program, but that any successor organization to the Conference should continuously observe and study the policies and administration of the hearing examiner program.

In respect to lawyers in government service, the Conference recommended that there be established a career service, and that administration of this service be in the Civil Service Commission, provided stated organizational arrangements are established.

The Conference concluded that agency programs for recruiting exceptionally well qualified law graduates should be continued, and that agencies not having such programs should consider establishing them. Other measures for improvement in recruiting were recommended.

The Conference was of the view that classification standards for attorney positions should permit allocation upon the basis of the work involved, regardless of technical review or of supervisory functions. It was recommended, finally, that a reasonable number of attorney positions be allocated to all of the "supergrades" in the general schedule.

Judicial Review of ICC Orders. For historical reasons, procedures for review of orders of the Interstate Commerce Commission in the United States courts differ from the traditional patterns which have developed governing judicial review of administrative action. Since 1903, orders of the Commission, except reparation orders, have been reviewed by three-judge Federal district courts specially constituted under authority of 28 U.S.C. §§ 1336, 2284, and 2325. The decisions of these courts may be taken to the United States Supreme Court by direct appeal, rather than by certiorari proceedings.

The Conference concluded that the reasons for conforming procedures for review of these orders to accepted concepts of judicial review far outweigh the reasons for perpetuating present procedures. It recommended (Recommendation No. 3) elimination of the use of special three-judge district courts for review of these orders and, instead, would subject them to judicial review in the United States Court of Appeals as is generally the case with the orders of other Federal regulatory agencies. Subsequent

Supreme Court review would then be upon writ of certiorari, rather than upon appeal. The Conference proposed (Recommendation No. 4) further procedures for improving review of orders of the Interstate Commerce Commission, all of which were designed to increase efficiency and save time, effort and expense in appellate procedures.

Subpena Power. The Conference recommended (Recommendation No. 13) a series of principles designed to achieve fairness and uniformity in subpena practices. These principles may be summarized as follows: In adjudications the presiding officer should have authority to issue subpenas, and they should be issued upon the request of any party. In investigatory proceedings, the agency, any member thereof, or any officer designated for the purpose should have such authority. It was recommended that the authority to summon witnesses extend throughout the United States and its territories and possessions, and that enforcement be available through the United States district courts. Fees to witnesses should be payable by the person or agency at whose instance they appear, at the same rates as in the Federal courts.

Production of Records and Briefs upon Judicial Review. The Conference considered matters of the expense incident to court review. It recommended (Recommendation No. 5) three measures which would substantially reduce such expense: that courts reviewing administrative action permit (a) agencies to produce the records in the administrative proceedings by means which would eliminate the need for reproducing that record upon judicial review; (b) the submission of briefs produced by means other than printing; and pending the implementation of (a), the designation after, rather than before, the filing of briefs of the portions of the record necessary to be reproduced.

Enforcement of National Labor Relations Board Orders. The attention of the Conference was directed to delay experienced in the enforcement of National Labor Relations Board orders. The Board must seek an order of enforcement from a United States Court of Appeals. Under present practice this involves a period of waiting to see if a party to the case intends to seek judicial review of the order. The Conference recommended (Recommendation No. 18) a procedure resulting in automatic judicial enforcement of orders of the Board, if no party promptly challenges the order. If no such challenge be forthcoming within 45 days after the Board has made its order, the order, after due notice to all parties, would be enforced without further proceedings by entry of an appropriate decree of the court.

Government Contract Appeals. The Conference recommended (Recommendation No. 12) that agencies having internal appellate entities which render decisions or opinions in disputes under agency contracts, afford contractors the opportunity to know and to contest the evidence which supports the contracting officer.

In the course of studies of agency procedures for handling appeals from contract disputes, instances were noted in which agencies had developed rules of procedure for such cases but had never published them, and had prepared written opinions but made them available only to parties to the particular proceeding. The Conference recommended (Recommendation No. 7) that agencies which have established procedures and boards for hearing contract appeals should publish, or make available for publication, their rules of procedure and all the decisions of such boards, excepting only decisions to be kept secret in the interests of national security.

Discovery Techniques. The Conference approved the principle that in adjudicatory proceedings agencies should establish procedures for the revelation of facts by the parties before formal hearing, but it went only so far as to recommend (Recommendation No. 30) that the agencies implement this principle to the extent and in the manner appropriate to their procedures.

Statistical Analysis of Proceedings. Up to the present time there have been no standards or criteria by which delays or backlogs in agency proceedings could be measured, there being no forms of reports which permit comparative evaluation of these procedures or effective dissection into stages.

The initial collection of information by the Committee on Statistics and Reports revealed that during the fiscal year 1960 approximately 80,140 formal proceedings for the determination of private rights and obligations had been commenced before more than 100 boards, commissions, and other agencies of the Government. Statistical analysis is essential to the comprehensive consideration of many problems, particularly the problem of unnecessary delays.

Accordingly, as a tool in the immediate work of the Conference and for use generally in efforts toward improvements in procedures, the Conference adopted as its first recommendation (Recommendation No. 1) a plan to collect and publish statistics on agency proceedings, looking toward the development of a continuing system for the compilation and publication of useful data. The product of this recommendation was a two-volume compilation, describing the kinds of proceedings conducted during the fiscal year 1961 and providing volume, backlog, and time-study data thereon. Based upon this experience the Conference undertook (Recommendation No. 17) a second compilation dealing with fiscal 1962. This was published in December 1962. At the Fifth Plenary Session the Conference

recommended (Recommendation No. 27) that provision be made for continuing this effort, expanding and improving the information thus assembled, and developing a foundation for a continuing system.

For the first time in the history of this Government there is available, in the data accumulated by this Committee, the basic material upon which realistic studies of the time consumed in administrative proceedings can be made. Two hundred sixty-eight types of proceedings were analyzed and grouped in a classified index according to their nature and purpose. They were placed in a directory organized by major parent agencies. The Committee had been furnished by the agencies with data from their docket entries in individual cases for the two years. By the use of a computer these figures were translated into periods of time consumed in the separate stages of the proceedings. For example, the analysis shows for each case the number of days from the start of the proceeding to the completion of the pleading stage, from the latter date to the opening of the hearing, the number of days consumed in hearing, and the period from the close of the hearing to the date ready for preliminary decision, from the latter date to the initial decision, and from that time until the final decision. The time for each of the several stages of each class of proceedings was totaled and averaged, and median figures were computed. This accumulation, analysis and arrangement of statistical data is dramatic in its way and undoubtedly supplies invaluable material for far-reaching and intensive studies of administrative proceedings.

Several recommendations adopted by the Conference merely authorized the submission to named agencies of suggestions for those agencies' consideration. In these instances it made no firm recommendations.

Broadcast Licensing. By one of these (No. 23) the Conference transmitted to the Federal Communications Commission several proposals relating to the licensing of broadcast facilities. These included (a) discontinuance of the use of formal hearings on applications presenting no substantial material question of fact; (b) increase in the authority of hearing examiners to determine interlocutory questions; and (c) fuller publication of the criteria employed in judging station program proposals.

Licensing of Truck Operations. By another such recommendation (No. 14) the Conference transmitted to the Interstate Commerce Commission for its consideration a number of proposals relating to the licensing of truck operations. Most of these proposals were concerned with the Commission's procedures prior to designation of applications for hearing. Their purpose was to facilitate the screening out of those applications filed without substantial foundation, to assure that protests are based upon genuine opposition, and to reserve oral hearings for those instances in which there is a real dispute between opposing parties. The proposals also advocated the requirement that certain portions of the parties' evidence be submitted in written form; urge greater supervision and coordination of the scheduling of applications for hearing; and advise similar coordination in establishing channels for intra-agency review of hearing examiner

decisions.

Greater authority for hearing examiners was suggested, both in the resolution of interlocutory matters and in the disposition of applications not requiring full evidentiary presentation. Finally, it was suggested that the extent to which hearing examiner conclusions may be adopted in agency opinions reviewing the hearing examiner decisions be clarified.

Domestic Air Route Authority. Another set of suggestions (Recommendation No. 21) were submitted to the Civil Aeronautics Board. They concerned techniques for improving proceedings relative to domestic air line route authority. Among them were suggestions that the Board state more precisely its reasons for instituting or refusing to institute a route proceeding, the granting of greater authority to hearing examiners to publish orders consolidating proceedings for hearing, and additional assistance to the Board's Special Counsel for Routes in the interests of expediting internal review of consolidation orders.

Suggestions were submitted relating to strictly intra-Board practices. Such for example, were the use of the Opinion-Writing Division, the authority of Bureau counsel upon argument, the identification of opinions, consultation between the Bureau of Economic Regulation and Bureau counsel, and the more complete informing of hearing examiners in respect to policies.

Miscellaneous. The Conference made a number of recommendations concerning matters which, while important, do not loom large in the total field of agency procedure. Such are recommendations respecting rights to papers and evidence (Recommendation No. 24), representation by attorneys (Recommendation No. 26), the drafting of documents to be published in the Federal Register (Recommendation No. 10), more widespread sale of the Government Organization Manual (Recommendation No. 11), and machinery for continuing self-study of procedures by the several agencies (Recommendation No. 8).

Office of Administrative Procedure. Contemplating the interim period which may ensue, due to a number of factors, between this Conference and the active functioning of a successor office or organization, the Conference made important recommendations (Recommendation No. 2) concerning the Office of Administrative Procedure in the Department of Justice. The process of developing improvements in administrative procedure is necessarily a continuing one. It involves not only periodic and fundamental re-examination, but the proper solution of day-to-day problems, many of them not suitable for Conference study. The Conference was impressed with the value of the services performed by the small staff of this Office in recent years in providing assistance in such problems.

The Conference recommended that the existing Office of Administrative Procedure be promptly more fully staffed in order that it might better perform its assigned functions pending completion of such steps as are necessary to provide full-time services in the whole area.

Implementation. No organized effort to implement the recommendations of this Conference has been made. This was for several reasons. First and principally, most of the recommendations of the Conference have been addressed to the President, and it was deemed best to await the final plenary session of the Conference and its final recommendations, so that its work might be considered and transmitted in proper context, rather than upon a piece-meal basis. Second, the eighteen months of the prescribed life of the Conference were not long enough to organize an effective program for these purposes; the consideration and adoption of the recommendations themselves consumed much time. Furthermore, a program of action of the scope and variety required for realistic results in this field requires top-level decisions. Some of the recommendations are for legislation; some are addressed to Cabinet Departments; and some are addressed to the agencies. Some of them are firm recommendations, and some are merely suggestions. Decisions as to the manner of implementation require time and careful planning. A continuing organization would necessarily include machinery whereby its recommendations for improvements of procedure would be effectively carried out. This would be a vital element of any such undertaking.

Despite the foregoing, recommendations of this Conference have to some degree met with voluntary and spontaneous adoption. Many of the agencies - if, indeed, not all - have undertaken reexamination of their procedural rules. Agencies preparing for the first time rules of procedure for formal hearings have followed recommendations of the Conference. The recommendation respecting the unification of Armed Services Boards of Contract Appeals has been put into effect. Drafts of bills

respecting the review of Interstate Commerce Commission orders have been prepared. Various agencies have undertaken steps in respect to the delegation of decisional authority. Since no reports have been sought from the agencies as to their unsolicited adoption, rejection, or pending consideration of Conference recommendations, no accurate statement on that subject is possible at this point.

As we have said, the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, the Honorable Oren Harris, has advised the Chairmen of the six large agencies within its legislative jurisdiction that his Committee will consider it to be the responsibility of each such agency to carry out the recommendations of the Conference in respect to ex parte communications, and to promulgate codes of behavior based on the principles adopted by the Conference.

V

UNDERLYING REPORTS

Distinguished specialists in administrative law and government, especially from the academic world, made a number of studies in depth for the Conference in various phases of the procedures of the agencies. Some of them have been regarded as by far the best studies available in their respective fields. One of the valuable products of the Conference is this important collection of studies and reports.

The distinguished legal scholars who prepared the bulk of these reports were Auerbach of Minnesota, Cramton of Michigan, Jones of Columbia, Kramer of George Washington, Lester of Cincinnati, McKay of New York University, and Metzger of Georgetown. Principally, Professor Auerbach did the reports on decisional authority and ex parte communications; Professor Cramton on ratemaking in general; Professor Jones on trucks, airlines and broadcasting (all in the area of licensing); Dean Kramer, who had the assistance of Professor Miller of his own school, on Judicial Review of Labor Board and Interstate Commerce orders; Professor Lester on hearing examiners and government lawyers; Professor McKay on discovery and subpena power; and Professor Metzger on government contracts. Professor Priest of Virginia is working on the proposed manual for protracted cases. Although a summary of the contents of these works is scarcely possible in a few paragraphs, some sense of their variety and of their scope and depth may be gathered from a brief review of their contents.

The Committee on Personnel prepared three reports, the first of which deals with the advanced training of professional personnel in the Government at large, and in the regulatory agencies in particular; training, that is,

in the substantive matters of agency concern. The second section of the report of the Committee deals comprehensively with the recruitment, examination, appointment, compensation, and grade classification of Section 11 hearing examiners. It also considers how the Federal hearing examiner program should be administered and by what agency. The third section of the report of the Committee on Personnel deals with the problems of Government attorneys, and reconsiders and re-evaluates the case for a career-merit service for Federal attorneys, including such special features as honor and intern programs, as well as further measures that may assist the Government to obtain and retain a legal corps of the highest competence. As in the report on hearing examiners, the Conference, in the report on Government attorneys considered how and by what agency the career-merit system for Government attorneys should be administered.

The Committee on Internal Organization and Procedure worked at great length and in much detail on numerous aspects of agency organization and procedure, producing a considerable body of material. It focused, in the main, however, on two problems of great importance to the conduct of agency proceedings - the matter of summary affirmance of initial decisions and the matter of ex parte communications. Both these issues were the subject of proposed legislation in the 87th Congress. Proposals to enlarge the scope of agency power to delegate final decisional authority and to limit the issues on appeal from initial decisions were embodied in S. 1734; and H. R. 14 dealt with the subject of improper ex parte communications. The Committee on Internal Organization and Procedure prepared reports on the provisions of the Administrative Procedure Act concerning agency review of initial decisions. In considering the delicate problem of ex parte communications, the Committee made an analysis of proposed legislation and of the

legislative history of Section 5(c) of the Administrative Procedure Act, and reported on the rules governing ex parte contacts enforced in six of the regulatory agencies.

The Committee on Rulemaking concentrated its study on the improved conduct of Federal rate proceedings, and made recommendations based on a general report and five studies dealing with particular agencies - Interstate Commerce Commission, Federal Power Commission, Federal Communications Commission, Civil Aeronautics Board, and the Department of Agriculture. The general report, after consideration of the basic elements of statutory rate procedures and of the various types of rate proceedings and their significant differences, examines in detail a number of special phases of the process by which rates are made. Among these are the nature of the hearing provided in rate cases, reduction of the number and the narrowing of the scope of rate proceedings before hearings, improvements in the hearing process itself, improvement of the decisional process, and measures to increase the effectiveness of this form of regulation. In the last of these concerns, attention is given to the improvement of the quality of agency personnel at all levels, the respective roles of rulemaking and adjudication in the development of rate policies, the feasibility of clarifying substantive standards, and the relative importance of concern with "procedural" as distinguished from "substantive" matters. It is the sense of the report that many of the difficulties encountered by the agencies in rate-making are substantive in character, and not immediately within the control of the agency, all by itself, to correct.

The basic reports of the Committee on Licensing deal with the licensing of truck operations by the Interstate Commerce Commission, the licensing of

airline operations by the Civil Aeronautics Board, and the licensing of broadcast facilities by the Federal Communications Commission. Each study begins with a consideration of the legislative background of the licensing provisions under consideration, the pertinent texts of the licensing statutes themselves, and the substantive policy considerations involved in their application. This background is intended to clarify the purposes the licensing process was intended to serve, and to identify the kinds of substantive issue with which the process is connected. The economic structure of the regulated industry is also examined to establish the context in which the licensing process operates. Thereafter, attention is given to the administrative organization and the procedures followed in the licensing process, including the informal working techniques employed by each agency. Consideration is given to the volume of applications handled within various classes and data are assembled on the time typically required to move from one procedural step to the next in processing applications within each class.

The reports then consider various problems suggested by these descriptive materials, and assess the value of the various alternatives of solution they present. Consideration is given to the question whether formal hearings are required for different classes of licensing application; the fuller utilization of written procedures; the amplitude of the authority of hearing examiners to deal with proceedings before them; the adequacy of provisions for intra-agency review; possible improvements in the decisional process; the clarification of various standards enforced by the agency; and measures for the reduction of delay in handling applications.

The Committee on Compliance and Enforcement Proceedings, like other committees of the Conference, prepared several monographs and summary statements of the authority and practices of the agencies for the information of

the Conference. The first of four principal reports by the Committee provided the basis for Conference consideration of the subpoena power in Federal administrative proceedings. This report summarizes typical agency practices, describes the procedures followed in special situations, and discusses the constitutional questions that have developed and been resolved in connection with investigatory subpoenas. It also states and explains the basis for recommended uniform principles to be applied to issuance, quashing, geographical scope, fees to witnesses, and methods of enforcement.

The second principal report of the Committee on Compliance and Enforcement Proceedings deals with the right to counsel in administrative proceedings. The Conference considered the meaning, in general, of the "right to counsel," the ways in which it has been variously interpreted in agency practice, and the way it should be understood in light of the phrase, "right to be accompanied, represented, and advised by counsel" in Section 6(a) of the Administrative Procedure Act. The third report outlines the need for greater uniformity in the rules relating to the recognition of attorneys; and the fourth principal report covers procedures for discovery and voluntary disclosure. Consideration is given to the arguments for the extension to agency proceedings of the more liberal discovery practices in civil proceedings in the United States courts.

The principal report of the Committee on Claims Adjudication dealt with procedures for debarment and suspension of contractors. In addition basic studies were made and memoranda prepared on various aspects of claims adjudication. Each study described existing administrative procedures in the major procurement agencies, discussed the shortcomings of

such procedures where relevant, and made detailed suggestions for improvement.

Three major reports were prepared by the Committee on Judicial Review. The first dealt with the judicial review of orders of the Interstate Commerce Commission and, like the reports of other committees, was based both upon documentary sources and upon interviews with agency and other Government personnel. The questions considered in the report included the procedure of review of Interstate Commerce Commission orders by specially constituted three-judge district courts; problems of venue; the method of reproduction of the record on review; and the relative advantages and disadvantages of final Supreme Court review of Interstate Commerce Commission orders by writ of certiorari rather than by appeal.

The second principal report of the Committee on Judicial Review dealt with the reproduction of the briefs and records on review of administrative orders. The report includes information about the use of methods other than printing for the original production of the record, in order to eliminate the need for reproduction of records on judicial review. Similar information is available with respect to appellate briefs. Particular attention was given to the use of joint appendices to the briefs.

The third of the three major reports concerned the review of orders of the National Labor Relations Board. A comprehensive report was prepared which summarizes the history of judicial review of administrative orders; studies which have been made in the past concerning their enforcement; and discussions held with members of the bar and with governmental officials as to such enforcement.

At the request of the Committee on Judicial Review, the Office of Administrative Procedure in the Justice Department compiled, in two volumes,

descriptions of all of the different kinds of formal administrative proceedings conducted by Federal agencies, together with information identifying statutory provisions for judicial review of decisions in each kind of proceedings. In a third volume, the Committee analyzed in outline form each of the statutes thus identified for purposes of affording comparisons with respect to some eighteen features of the provisions for judicial review, such as, who may obtain review, the form of pleading by which review is sought, the courts having jurisdiction to review, provisions for interlocutory relief, scope of review, the relief available, etc. The vast amount of information collected in these three volumes thus provides the basic data for comprehensive comparative study in the field of judicial review of administrative action.

The studies and reports of the Administrative Conference constitute a valuable collection of papers on the administrative process. They have served an immediate purpose in the development of the recommendations of the Conference. They have an enduring value to governmental officials, members of the Bar, and students of Federal administrative procedure as works of scholarly research and judgment in the sensitive area of governmental regulation.

VI

UNFINISHED BUSINESS AND PROJECTED STUDIES

The range of relevant inquiry confronting the Conference at its inception was so vast that it is no more feasible now than it was then to identify and enumerate all of the potentially fruitful subjects of study. Indeed, because of the limited life of the Conference under the Executive order creating it, it became apparent quite early in its experience that a conscious effort was required to limit its work to projects which would

have some chance of completion in the prescribed period. Accordingly, the Committees, to whom the Council had originally suggested numerous specific areas for investigation, were repeatedly admonished to concentrate selectively upon matters as to which, in the time available, reasonable research could be accomplished and made the basis of recommendations to the Conference. Since Conference action is the culmination of a process involving, successively, research reports by the staff directors and consultants, the formulation of recommendations by the Committees, consideration of such recommendations by the Council for possible transmission to the Conference, and, finally, consideration and debate by the full Conference in plenary session, the problem of timing in relation to the relatively short life of the Conference has been a formidable one.

The Committees have manfully endeavored to cope with this problem, and their efforts in this regard have not been unavailing, as evidenced by the number of significant recommendations emerging from the Conference. The nature of the subject matter is such, however, that it has been neither possible nor desirable to translate all the work that has been undertaken into terminal results; and it also has not been feasible to initiate work on all projects of obvious relevance to the purposes for which the Conference was created. The individual Committees, thus, found themselves at the close of this Conference with an inventory of matters in both such categories, that is to say, projects launched but not advanced to the stage of Conference consideration, and projects identified as fully appropriate for investigation but in respect of which activity of any degree had to be deferred. Even these two groups are not exhaustive inasmuch as the second in many instances is comprised of matters which were first conceived as candidates for accomplishment during this Conference, leaving other subjects undiscussed in tacit

recognition that they were completely outside that possibility.

Committee on Claims Adjudication. This Committee found itself at the close of the Conference with three items directed towards the achievement of a more comprehensive administrative apparatus for the resolution of contractual disputes, upon which work has been done but which remains incomplete in terms of recommendations to the Conference. These were:

(1) The expansion of the jurisdiction of governmental boards of contract appeals to include disputes over the interpretation or application of sub-contracts.

(2) The enlargement of the jurisdiction of governmental boards of contract appeals beyond disputes as to interpretation or application into such areas as breaches of contract, rescission, reformation and equitable adjustments of various kinds.

(3) The establishment of administrative appellate procedures in respect of disputes over contract awards (other than matters relating to the debarment or suspension of individual bidders or contractors, which have already been the subject of a Conference recommendation).

These unfinished matters, in common with the various Conference recommendations which emanated from this Committee, relate to claims deriving from Government contracts. As its name suggests, however, the Committee's scope extended to all manner of claims against the Government. These include those sounding in tort as well as contract, claims involving land, and the great variety of claims which can be characterized as benefit determinations (i.e., social security, unemployment compensation and retirement matters, veterans affairs, maritime subsidies, agricultural payments, and similar matters under statutory systems or grants). These categories are of no less significance than contract claims, but the Committee concluded quite sensibly at the outset that it would have time during this Conference only to address itself to the latter.

Committee on Compliance and Enforcement Proceedings. Research was carried on and materials assembled with respect to two subjects as to which there has not been time for the formulation of recommendation. These matters are (1) the scope of agency orders, including particularly settlements, stipulations and consent orders; and (2) the variety and impact of formal agency sanctions.

For future study the Committee has, with no purpose to be exhaustive, denominated the following as appropriate for investigation:

(1) Pre-hearing conferences.

(2) The conduct of the hearing, with particular reference to evidentiary matters and the problems of recesses.

(3) Advisory opinions.

(4) The use of informal sanctions.

Committee on Internal Organization and Procedure. A project which the Committee did not have time to consider is a study by the Committee staff director of the internal organization and procedures of the Federal Trade Commission. The final text of this report will have had the benefit of examination and comment, first, by members of the Commission and its staff and, later, by members of the FTC Bar. The Committee anticipates that the report will be a useful source of recommendations when and if the opportunity is provided to consider it in detail The Committee also received from its staff a memorandum with respect to the publication of dissenting opinions by agency members, but time did not permit consideration of this subject.

This is the Committee which originated the recommendation on ex parte communications embodied in the Conference's Recommendation No. 16.

The code there proposed was expressly limited to communications from without the agency. Left untouched because of time is the almost equally important problem of internal communications within the agency. Other areas which the Committee has identified as worthy of future study are:

(1) Delegation of authority in these aspects -

(a) Decision making in respect of matters where a formal hearing is not required; and

(b) The institution of investigations or prosecutions.

(2) The scope of the power to be placed in the agency chairman.

(3) The extent to which delegation of decision-making affects the volume of cases for which judicial review is sought.

(4) The degree, manner and results of the utilization by the agencies concerned of the powers of delegation granted in the Reorganization Plans of 1961 and in the special delegation legislation enacted for the Interstate Commerce Commission, the Securities and Exchange Commission, and the Federal Communications Commission.

(5) An evaluation of the code of administrative procedure proposed by the American Bar Association in the light of the work of this Conference.

Committee on Rulemaking. The Committee decided at the outset that the problems of delay and expense in administrative proceedings are frequently associated with rate cases at certain of the major agencies and could most usefully be explored in the first instance by a survey of those cases. Accordingly, thorough-going reports were prepared on the conduct of rate cases at the Interstate Commerce Commission, the Federal Power Commission, and the Federal Communications Commission. The Committee, on the basis of these reports, formulated the Conference's

Recommendation No. 19, but it recognized in terms that additional recommendations probably would be forthcoming after further opportunity to consider these reports. Research was undertaken on the holding of rate proceedings by the Department of Agriculture, but there was not time to prepare and circulate a report.

The scope of the Committee's assignment extended to informal rulemaking, as well as to the formal type represented by the rate case. The Committee concluded, however, that time would not permit the exploration of this important area, and it was reserved for the future. Formal rulemaking proceedings are not, of course, confined to rate cases, and the Committee believes that the use and appropriateness of adjudicatory procedures in these other types of rulemaking is a promising subject for future exploration. A third project for the future is a survey of the non-adversary type of rulemaking proceeding, involving the issuance of substantive or procedural rules of general applicability. Two aspects of these general rulemaking proceedings which appear to merit attention relate to the notice to be given to the parties, and the standards to be applied in the determination of who should be permitted to participate.

Committee on Licenses and Authorizations. Existing research remains incomplete in respect of possible amendments of the Administrative Procedure Act for the purposes of (1) enlarging the agencies' power to select hearing officers for economic licensing cases not involving legal issues or propriety of past conduct and to give such officers greater freedom to consult with non-participating agency personnel; and (2) fostering greater clarity and consistency in the articulation from case to case of agency

standards and policies.

Although reports were completed and issued on truck licensing by the Interstate Commerce Commission, radio and television licensing by the Federal Communications Commission, and domestic air carrier licensing by the Civil Aeronautics Board, there has not been time to get out a report reflecting research on the certification of natural gas pipelines by the Federal Power Commission. These are, of course, four vital areas of Federal licensing.

Committee on Judicial Review. As the Conference neared its end, this Committee released for circulation a massive compilation of all Federal statutory provisions relating to judicial review of administrative action. Among the purposes which motivated this compilation were those of (1) determining whether there is any rational basis for the existence of District Court review in some cases and Court of Appeals review in others; and (2) ascertaining, from a comparative analysis of the different modes of review presently provided, whether it may be practicable to devise one or two simplified methods of judicial review for all administrative action. The pursuit of these purposes is for the future, as is also consideration of a proposal pending in the Committee that all findings of fact by administrative agencies in protracted proceedings be required to be annotated to the record.

Another subject marked by the Committee for future examination, and one on which no work has been started, relates to the reviewability of administrative action in certain types of rulemaking where a formal record hearing is provided by the agency although not required by law.

Committee on Personnel. The studies of this Committee during the life of the Conference were addressed principally to hearing examiners and legal personnel. Important as these are in the administrative process, they do not, as the Committee recognizes, include many important categories of professional and technical people who perform equally vital roles in that process. The Committee also expressly excluded from its work problems with respect to the appointment and tenure of agency members. Thus, although no incomplete projects are pending, the Committee's area of interest has by no means been encompassed by the work of this Conference. The Committee is of the view that the policies and administration of the hearing examiner program are an appropriate subject for continuous observation and periodic reappraisal, as is also the relationship of the Civil Service Commission to the administration of programs for professional personnel generally.

Committee on Information and Education. This Committee has one major unfinished project in train. This is the proposed manual on procedures for protracted administrative hearings. Conceived as an analogue of the handbook on protracted litigation prepared by the Judicial Conference of the United States, the proposed manual is in draft form and has been widely circulated for comment.

Another project in the preliminary stage is the preparation of an indexed digest-guide to all Federal laws in the United States Code and all regulations in the Code of Federal Regulations relating to the availability to the public of governmental information. The purpose of this compilation is twofold: one, to enable each citizen to ascertain conveniently what information he is entitled to have and the source of

his right, and, two, to permit a survey to be made of the extent to which Federal departments and agencies are currently complying with such laws and regulations.

A continuous function of the Committee is the holding of seminars in various parts of the country in association with bar associations, law schools, and other interested groups, where information may be both collected and disseminated with respect to administrative activities. A specific project for the future is an effort to compile a manual on the preparation and presentation of economic and scientific evidence. The Committee has also suggested that it would be desirable at a later date to initiate programs for (1) the interchange of American and foreign government career personnel for the purpose of generating comparative knowledge of the administrative process, and (2) the creation of a coordinated system among the agencies for the employment of mechanical means of carrying on legal research.

Committee on Statistics and Reports. This Committee collected material descriptive of the methods and systems by which statistical data relating to administrative proceedings are handled by the leading agencies. It would be useful for this material to be analyzed and disseminated to all the agencies for their information and possible utilization or adaptation. We have already described the statistical reports for fiscal years 1961 and 1962.

The computer has significance for the administrative process. Its use in the areas of information acquisition, storage, and retrieval has wide implications for the more effective management by the agencies of the dispatch of their business, as well as for private parties in the

enhanced effectiveness and reduced costs of making their presentations in administrative proceedings. The provision of skilled guidance for the agencies in using the computer is a continuing project of the first magnitude. Within the time available, the Committee at this Conference was able only to envision the possibilities, not to realize them.

Matters Unassigned to Committees. In addition to the several subjects noted by the Committees as proper for future consideration, several subjects were brought to the attention of the Council but were not, because of time limitations, referred to Committees. These include the possibility of uniform rules of procedure, the feasibility of automatic retrieval and coordination of research material, the procedures now followed in the leasing or other disposition of public lands (a matter called to the attention of the Conference by Mr. Justice Douglas), and a great many projects in the general area of basic governmental principles involved in the processes of regulatory agencies.

VII

STATISTICAL REVIEW

As we have already pointed out, the total membership of the Conference was 87 general members, plus the Chairman and the 12 Congressional liaison members.

The Conference met in six plenary sessions, all in Washington,D.C. The first four sessions were held in the State Department Building; three in the International Conference Room, and one in the West Auditorium. The fifth session was held in the Interstate Commerce Commission Building, and the sixth and final session in the Senate Appropriations

Committee Hearing Room in the New Senate Office Building.

In order that work might be started before the summer of 1961, the First Plenary Session was held on June 27, 1961. The five later sessions convened on December 5 and 6, 1961, April 3, 1962, June 29, 1962, October 16, 17, and 18, 1962, and December 4 and 5, 1962. The first session was attended by 76 members, the second by 74 members, the third by 77 members, the fourth by 69 members, the fifth by 81 members, and the final session by 72 members.

The nine standing committees met for the first time immediately following the First Plenary Session. During the 18 months which followed there were a total of 93 such committee meetings through which the committees directed staff activity, critically examined the products of their research and study, and developed proposed recommendations for consideration and debate by the full Conference.

Initial arrangements for the operation of the Conference included the establishment of an inter-agency group fund, pursuant to authority contained in the Executive order and 31 U.S.C. § 691. As soon as the Council had determined which agencies would participate in the Conference through the designation of members, the agencies were asked to contribute from their 1961 appropriations $1,000 for each member designated and a like amount from 1962 funds. In this way $60,000 was made available for the first few months of Conference operation.

In addition to the research and staff assistance made available to the Conference from the Office of Administrative Procedure in the Department of Justice under the provisions of the Executive Order, 15 legal scholars from university faculties were engaged as part-time

employees to assist in Conference studies. Also, arrangements were made with participating agencies under which 35 agency lawyers were made available to the Office of Administrative Procedure on a part-time basis for Conference research. Subsequently, others were employed, as needed. During the entire 18-month experience, 35 persons were employed and paid per diem compensation to assist with committee and Conference work, and 40 agency attorneys contributed to the research which was conducted.

In September 1961, Congress added to the funds available an appropriation of $150,000 for Conference operations during the remainder of the fiscal year 1962, and in October 1962 an additional $100,000 was appropriated for the six months of fiscal year 1963 in which the Conference would be in operation.

At the end of fiscal year 1961, $28,018.09 of the funds contributed to the inter-agency group fund remained unobligated. At the end of fiscal 1962, $57,543 remained unused from the total funds available. These unobligated balances were, of course, released to the Treasury of the United States.

Respectfully submitted -
For the Conference
By

E. Barrett Prettyman,
Chairman.

December 15, 1962

APPENDIX I

THE WHITE HOUSE

EXECUTIVE ORDER

10934

ESTABLISHING THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WHEREAS the performance of regulatory functions and related responsibilities for the determination of private rights, privileges, and obligations by executive departments and administrative agencies of the United States Government substantially affects large numbers of private individuals and many areas of economic and business activity; and

WHEREAS it is essential to the protection of private and public interests and to the sustained development of the national economy that Federal administrative procedures ensure maximum efficiency and fairness in the performance of these governmental functions; and

WHEREAS the steady expansion of the Federal administrative process during the past several years has been attended by increasing concern over the efficiency and adequacy of department and agency procedures; and

WHEREAS the experience of the several groups which have examined Federal administrative procedures in recent years demonstrates that substantial progress in improving department and agency procedures can result from cooperative effort by the departments and agencies, working together with members of the practicing bar and other interested persons:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is ordered as follows:

Section 1. Establishment of the Conference. There is hereby established a conference to be known as the Administrative Conference of the United States, which shall consist of a Council of eleven members named by the President, one of whom he shall designate to be Chairman of the Conference, and a general membership from Federal executive departments and administrative agencies, the practicing bar, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures.

Section 2. Purpose. The purpose of the Conference shall be to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures. To this end the Conference shall conduct studies of the efficiency, adequacy and fairness of procedures by which Federal executive departments and administrative agencies protect the public interest and determine the rights, privileges and obligations of private persons. The Conference shall from time to time report to the President any conclusions reached by its members based on such studies, together with suggestions for appropriate measures to improve the administrative process. The Conference shall make a Final Report to the President no later than December 31, 1962, summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future.

Section 3. Membership. The composition of the general membership of the Conference shall be determined by the Council; provided that the total membership shall be not less than fifty persons, and at least a majority of the total membership shall be from Federal executive departments and administrative agencies, so distributed as to effect an appropriate representation among the several departments and agencies. General members from Government service shall be designated by the heads of their respective departments and agencies. Other general members shall be named by the Chairman with the approval

of the Council from the practicing bar, scholars in the fields of administrative law and government, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures. Members of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States.

Section 4. Staff. The Attorney General of the United States is hereby authorized and directed to furnish to the Conference research and staff assistance from the Office of Administrative Procedure in the Department of Justice, through the Director of that Office and the Chairman of the Conference, and the Director of the Office of Administrative Procedure shall act as Executive Secretary of the Conference.

Section 5. Operation of the Conference. The Conference shall have authority to adopt bylaws and regulations not inconsistent with the provisions of this order for the conduct of its functions. Every member of the Conference will be expected to participate in all respects according to his own views, and not necessarily as a representative of any department or agency or other group from which he may have been chosen.

Section 6. Committees. Committees of the Conference shall be appointed by the Chairman, with the approval of the Council. Committees shall have authority to designate subcommittees from their own membership for the purposes of conducting studies and making reports to the full committees.

Section 7. Functions of the Council. The Council is hereby authorized to perform the following functions:

(a) To meet under the chairmanship and upon the call of the Chairman of the Conference.

(b) To determine the composition of the general membership of the Conference as provided in section 3 above.

(c) To make appropriate arrangements with the President of the Senate and the Speaker of the House of Representatives for participation in the activities of the Conference by interested committees of the Congress. Representatives of the Congress shall have the privilege of the floor of the Conference.

(d) To determine the time and place of plenary sessions of the Conference.

(e) To propose bylaws and regulations, including rules of procedure and Committee organization, for adoption by the Conference.

(f) To propose to the Conference the matters concerning which the Conference and its committees shall conduct investigations and studies.

(g) To receive and consider reports of committees of the Conference and proposals adopted by the Conference, and to transmit them to the President together with the views of the Council concerning such matters.

Section 8. Cooperation of Federal agencies. All executive departments and administrative agencies of the Federal Government are authorized and directed to cooperate with the Conference and to furnish such information and assistance not inconsistent with law as may reasonably be required in the performance of its functions.

Section 9. Expenditures of the Conference. Each executive department and administrative agency which is represented by one or more members of the Conference named or designated as provided in section 3 of this order shall, as may be necessary for the purpose of effectuating the provisions of this order, furnish assistance to the Conference in accordance with section 214 of the act of May 3, 1945, 59 Stat. 134 (31 U.S.C. § 691). Such assistance may include detailing employees to the Conference to perform such functions consistent with the purposes of this order as the Conference may assign to them.

JOHN F. KENNEDY

THE WHITE HOUSE
April 13, 1961

APPENDIX II

IDENTIFICATION OF COUNCIL MEMBERS

Judge E. Barrett Prettyman (Chairman), Senior Judge of the United States Court of Appeals for the District of Columbia Circuit.

Max D. Paglin (Vice Chairman) General Counsel, Federal Communications Commission, formerly Assistant General Counsel and staff member.

Manuel F. Cohen, Member of the Securities and Exchange Commission, formerly Director, Division of Corporation Finance, Securities and Exchange Commission.

Walter Gellhorn, Professor of Law, Columbia University, 1933 to date; Director, Attorney General's Committee on Administrative Procedure, 1939-1941; Office of the Solicitor General, United States Department of Justice, 1932-1933; author of various books on administrative law.

Joseph P. Healey, Vice-President-General Counsel of Boston-Edison Company; former Commissioner of Corporations and Taxation for the Commonwealth of Massachusetts; former law partner in law firm of Hemenway and Barnes, Boston, Massachusetts; Professor of Corporate Law at Boston College Law School since 1947.

Everett Hutchinson, Member and former Chairman of the Interstate Commerce Commission.

James M. Landis, Partner in the firm of Landis, Brenner, Feldman and Reilly; formerly Special Assistant to the President; Chairman of the Civil Aeronautics Board; Chairman of the Securities and Exchange Commission; Dean of the Harvard Law School.

John D. Lane, Member of the firm of Hedrick and Lane, Washington, D. C.; formerly Administrative Assistant to Senator Brien McMahon of Connecticut.

Earl Latham, Eastman Professor of Political Science, Amherst College, Amherst, Massachusetts.

Carl McGowan, Member of the firm Ross, McGowan and O'Keefe, Chicago, Illinois; General Counsel, Chicago & Northwestern Railroad; formerly Professor of Law, Northwestern University Law School; formerly counsel to the Governor of Illinois.

Nathaniel L. Nathanson, Professor of Law, Northwestern University; consultant to the Justice Department with respect to administrative procedures, 1961; Office of Price Administration, Associate General Counsel, 1942-1945; Securities and Exchange Commission, 1935-1936; Law Clerk to Justice Louis D. Brandeis, 1934-1935; author of casebook on administrative law.

APPENDIX III

GENERAL MEMBERSHIP
OF THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Robert E. Adams1/ of the
Department of Commerce
Karl E. Bakke of the
United States Tariff Commission
Donald C. Beelar of the firm Kirkland, Ellis, Hodson,
Chaffetz & Masters, Washington, D. C.
James H. Benney of the firm Orrick, Dahlquist,
Harrington & Sutcliffe, San Francisco, California
Marver H. Bernstein of
Princeton University
Carman G. Blough of
Harrisonburg, Virginia
J. D. Bond of the
Atomic Energy Commission
Reva Beck Bosone of the
Post Office Department
Cyril F. Brickfield2/ of the
Veterans Administration
Kent H. Brown of the
State of New York Public Service Commission
Charles W. Bucy of the
Department of Agriculture
Clark Byse of the
Law School of Harvard University
John T. Chadwell of the firm Snyder, Chadwell, Keck,
Kayser & Ruggles, Chicago, Illinois
G. Howland Chase of the Board of Governors
of the Federal Reserve System
Cyrus J. Colter of the
Illinois Commerce Commission
John F. Cushman of the
Federal Communications Commission

1/ Succeeded Paul A. Johnston of the Department of Commerce.
2/ Succeeded William J. Driver of the Veterans Administration.

Richard M. Davis of the firm
Lewis, Grant & Davis, Denver, Colorado
George S. Dixon of the firm
Matheson, Dixon & Bieneman, Detroit, Michigan
Charles Donahue of the
Department of Labor
Thomas J. Donegan of the
Subversive Activities Control Board
Bernard Dunau of the firm
Jaffee & Dunau, Washington, D. C.
David C. Eberhart of the
General Services Administration
Irvin Fane of the firm
Spencer, Fane, Britt & Browne, Kansas City, Missouri
Joseph A. Fanelli of the firm
Fanelli & Spingarn, Washington, D. C.
Roland J. Faricy3/ of the firm
Faricy, Moore, Costello & Hart, St. Paul, Minnesota
William Feldesman of the
National Labor Relations Board
David Ferber of the
Securities and Exchange Commission
Edward W. Fisher of the
Department of the Interior
Thomas J. Flavin4/ of the
Department of Agriculture
Abe Fortas of the firm
Arnold, Fortas & Porter, Washington, D. C.
Ralph Fuchs of the
University of Indiana Law School
Myles F. Gibbons of the
Railroad Retirement Board
Robert E. Giles of the
Department of Commerce
Whitney Gillilland of the
Civil Aeronautics Board
Robert W. Ginnane of the
Interstate Commerce Commission

3/ Deceased.

4/ Succeeded Neil Brooks of the Department of Agriculture.

Nathaniel H. Goodrich5/ of the
Federal Aviation Agency
Frank C. Hale6/ of the
Federal Trade Commission
Lawrence E. Hartwig of the
Renegotiation Board
James McI. Henderson of the
Federal Trade Commission
Harold W. Horowitz of the
Department of Health, Education, and Welfare
Thomas T. F. Huang7/ of the
Department of State
Leo A. Huard of the
University of Santa Clara College of Law
Rosel H. Hyde of the
Federal Communications Commission
John A. Johnson of the
National Aeronautics and Space Administration
T. C. Kammholz of the firm
Vedder, Price, Kaufman & Kammholz, Chicago, Illinois
R. Keith Kane of the firm
Cadwalader, Wickersham & Taft, New York, N. Y.
Sidney G. Kingsley8/ of the
Atomic Energy Commission
Earl Kintner of the firm
Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.
John W. Kopecky of the
Housing and Home Finance Agency
William C. Koplovitz of the firm
Dempsey & Koplovitz, Washington, D. C.
Sol Lindenbaum of the
Department of Justice
Karl D. Loos of the firm
Pope, Ballard & Loos, Washington, D. C.
Dominick L. Manoli of the
National Labor Relations Board

5/ Succeeded Daggett H. Howard of the Federal Aviation Agency.
6/ Succeeded Philip R. Layton of the Federal Trade Commission.
7/ Succeeded William L. Griffin of the Department of State.
8/ Succeeded John S. Graham of the Atomic Energy Commission.

John C. Mason of the
Federal Power Commission
Joseph E. McElvain of the
Department of Health, Education, and Welfare
Thomas G. Meeker of the firm Schnader, Harrison,
Segal & Lewis, Philadelphia, Pennsylvania
Lawrence V. Meloy of the
Civil Service Commission
James L. Pimper of the
Federal Maritime Commission
John B. Prizer of the
Pennsylvania Railroad Company, Philadelphia, Penna.
Edwin F. Rains9/ of the
Department of the Treasury
Sidney Rawitz of the
Department of Justice
Emmette S. Redford of the
University of Texas
Hubert A. Schneider of
Pan American World Airways, New York, N. Y.
David Searls of the firm
Vinson, Elkins, Weems & Searls, Houston, Texas
Harold Seidman of the
Bureau of the Budget
Ashley Sellers of the firm
Cummings & Sellers, Washington, D. C.
Edward F. Sloane of the
Federal Home Loan Bank Board
Fred B. Smith10/ of the
Department of the Treasury
Bertram E. Stillwell of the
Interstate Commerce Commission
Fredric T. Suss of the
Small Business Administration
Joseph C. Swidler11/ of the
Federal Power Commission
Earl J. Thomas of the
Department of the Interior

9/ Succeeded Robert H. Knight of the Department of the Treasury.
10/ Succeeded John K. Carlock of the Department of the Treasury
11/ Succeeded Jerome K. Kuykendall of the Federal Power Commission.

Cyrus R. Vance,
Secretary of the Army
John H. Wanner of the
Civil Aeronautics Board
Howard C. Westwood of the firm
Covington & Burling, Washington, D. C.
Edmund H. Worthy of the
Securities and Exchange Commission
Joseph Zwerdling of the
Federal Power Commission

CONGRESSIONAL REPRESENTATIVES

Everett McKinley Dirksen
Senator from Illinois
Philip A. Hart
Senator from Michigan
Edmund S. Muskie
Senator from Maine
John B. Bennett
Representative from Michigan
Oren Harris
Representative from Arkansas
Walter Rogers
Representative from Texas

ALTERNATE CONGRESSIONAL REPRESENTATIVES

Thomas B. Collins of the
Senate Committee on the Judiciary
Franklin B. Dryden of the
Senate Committee on Appropriations
Cornelius Kennedy of the Senate Subcommittee
on Administrative Practice and Procedure
Kurt Borchardt of the House Committee
on Interstate and Foreign Commerce
Charles P. Howze of the
House Special Subcommittee on Regulatory Agencies
Andrew Stevenson of the
House Committee on Interstate and Foreign Commerce

CONSULTANTS

Robert M. Benjamin of the firm Parker, Duryee, Benjamin, Zunino and Malone, New York, N. Y.

Kenneth Culp Davis of the University of Chicago Law School

J. Forrester Davison of the George Washington University School of Law

Roger S. Foster of Westinghouse Air Brake Company, Pittsburgh, Penna.

Louis L. Jaffe of the Law School of Harvard University

John D. Millett, President of Miami University, Oxford, Ohio

J. Lee Rankin of New York, N. Y.

Robert L. Stern of the firm Mayer, Friedlich, Spiess, Tierney, Brown and Platt, Chicago, Ill.

APPENDIX IV

TEXT OF THE RECOMMENDATIONS OF THE CONFERENCE

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APPENDIX IV

TEXT OF THE RECOMMENDATIONS OF THE CONFERENCE

RECOMMENDATION NO. 1

IT IS RECOMMENDED THAT:

The Conference, acting pursuant to Section 8 of Executive Order 10934, request the Executive departments and administrative agencies which conduct administrative proceedings for the determination of private rights, privileges, and obligations to furnish to the Conference (addressing the Chairman of the Committee on Statistics and Reports) the information requested in the form of report approved this day by the Conference, a copy of which report is hereto attached.

RECOMMENDATION NO. 2

WHEREAS a continuing need exists for adequate performance of the duties now assigned to the Office of Administrative Procedure by its charter, which are as follows:

(a) To carry on continuous studies of the adequacy of the procedures by which Federal departments and agencies determine the rights, duties, and privileges of persons;

(b) Initiate cooperative effort among the departments and agencies and their respective bars to develop and adopt so far as practicable uniform rules of practice and procedure;

(c) Collect and publish facts and statistics concerning the procedures of the departments and agencies; and

(d) Assist departments and agencies in the formulation and improvement of their administrative procedures.

Recommendation No. 2 (Continued)

To that end the Conference recommends as follows:

IT IS RECOMMENDED THAT:

The Office of Administrative Procedure be more adequately staffed and budgeted than at present so that it can discharge the above functions until further recommendations of the Conference.

RECOMMENDATION NO. 3

IT IS RECOMMENDED THAT:

(1) review of Interstate Commerce Commission orders should be upon appeals to the United States Courts of Appeals in all cases where at present a special three-judge court is used; District Courts should be relieved of their jurisdiction under 28 U.S.C. § 1336, and the Courts of Appeals should have exclusive jurisdiction to review these orders of the Commission;

(2) final review of orders of the Interstate Commerce Commission by the Supreme Court of the United States should be only by petition for a writ of certiorari;

(3) review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

RECOMMENDATION NO. 4

IT IS RECOMMENDED THAT:

Procedures for judicial review of orders of the Interstate Commerce Commission by Courts of Appeals should incorporate the following features:

Recommendation No. 4 (Continued)

(1) A limit of 60 days should be imposed as the time within which a petition for review must be filed in any case for which the present statutory provisions do not fix a period for filing petitions for review, such 60-day period to run from the date of entry of the order appealed from or entry of an order denying reconsideration thereof where petitions for reconsideration are allowed by the Commission's rules, whichever is later.

(2) Appeals should be commenced by the filing of a petition for review in the form of a notice of appeal.

(3) Anyone seeking review should be required to serve notice of appeal upon all parties to the proceeding before the Commission, the Department of Justice, and the Commission.

(4) When several appeals are taken from the same order of the Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court, consolidated therewith, and handled as one appeal.

(5) The Commission should provide the record of its proceedings on appeal and should transmit the record to the court. Until such time as procedures are developed whereunder the Commission may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for the designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs. The record should be returned to the Commission upon final decision of the appeal.

RECOMMENDATION NO. 5

IT IS RECOMMENDED THAT:

Rules of court governing judicial review of administrative action should be revised to permit:

(1) the use by departments and agencies of means of producing the record in administrative proceedings in a form which will eliminate the need for any reproduction thereof upon judicial review;

(2) the submission of briefs produced by processes which provide legible copies and yet are more economical than printing; and

(3) pending implementation of (1) above, the designation of record after the filing of briefs.

RECOMMENDATION NO. 6

IT IS RECOMMENDED THAT:

The Armed Services Board of Contract Appeals be constituted as a unitary board in the Defense establishment, and that, to the extent practicable, subsidiary boards which decide or render opinions upon disputes concerning contracts be eliminated as soon as possible.

RECOMMENDATION NO. 7

IT IS RECOMMENDED THAT:

Departments and agencies of the Federal Government which have established internal appellate procedures and entities (i.e., boards of contract appeals, boards of review, etc.) which render decisions or opinions concerning disputes under contracts of departments or agencies:

Recommendation No. 7 (Continued)

(1) publish or make available for publication the applicable rules concerning such procedures; and

(2) publish or make available for publication and inspection by the public all final decisions or opinions, past, current, and future, by the deciding or opinion-rendering entities in such departments or agencies.

RECOMMENDATION NO. 8

WHEREAS several of the executive departments and administrative agencies have recently undertaken to examine their rules of procedure with a view to improvements in efficiency, adequacy, and fairness:

IT IS RECOMMENDED THAT:

These agencies are to be commended for this activity; and that all executive departments and administrative agencies having functions requiring rules of procedure should, in the public interest, inaugurate similar examinations of such rules of procedure for these purposes; and, further, that every executive department and administrative agency having functions requiring rules of procedure should establish within its organization a means, either by assignment of the duty to an official or by the creation of an office for the purpose, for continuous observation of its procedures and for evaluating their effectiveness to the agency and to persons having matters before the agency.

RECOMMENDATION NO. 9

IT IS RECOMMENDED THAT:

In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate unnecessary delay in the administrative process of deciding contested matters:

Recommendation No. 9 (Continued)

1. Section 8 of the Administrative Procedure Act should be amended to make it clear that:

a. Every agency which is under a statutory duty to promulgate rules or adjudicate cases on the record after a hearing and does not either itself preside at the prescribed hearing or require the entire record to be certified to it for initial decision -

(1) may require the party seeking administrative review of the initial decision rendered by the officer who presided at the hearing (or by any other officer authorized by law to make it) to specify the alleged errors in the initial decision and the portions of the record supporting the allegations of error with such particularity as the agency may prescribe, and

(2) may confine its administrative review of the initial decision to the specified errors and portions of the record.

2. Section 8 of the Administrative Procedure Act should be amended to make it clear that:

a. When a party to a proceeding seeks administrative review of an initial decision rendered by the officer who presided at the hearing (or by any other officer authorized by law to make it), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing (in the manner prescribed by statute or agency rule, such as a petition for review or a bill of exceptions), that

Recommendation No. 9 (Continued)

(1) a prejudicial procedural error was committed in the conduct of the proceeding; or

(2) the initial decision embodies

(a) a finding or conclusion of material fact which is clearly erroneous; or

(b) a legal conclusion which is erroneous; or

(c) an exercise of discretion or decision of law or policy which is important and which the agency should review.

Nothing in this paragraph shall be construed to limit the powers of delegation of any agency under any other statute or reorganization plan.

b. The agency's decision to accord or not to accord administrative finality to an initial decision in accordance with recommendation 2a above shall not be subject to judicial review. If, however, the initial decision becomes the decision of the agency because the petition for review of the initial decision is denied or because the initial decision is affirmed summarily, such agency decision, of course, will be subject to judicial review in accordance with the standards for judicial review of agency decisions established by law.

RECOMMENDATION NO. 10

IT IS RECOMMENDED THAT:

1. The need for improved comprehensibility of Federal Register documents be brought to the attention of the heads of all executive departments and administrative agencies.

Recommendation No. 10 (Continued)

2. The head of each department and agency be requested to take the necessary steps to assure that his organization systematically uses and contributes to:

(a) the "Federal Register Handbook for Executive Agencies,"

(b) the training program entitled "Drafting Good Federal Register Documents," and

(c) the central collection of information and the facilities available through the Office of the Federal Register.

RECOMMENDATION NO. 11

IT IS RECOMMENDED THAT:

1. The Superintendent of Documents be formally notified that the Administrative Conference endorses the public advertisement and sale of the United States Government Organization Manual at established outlets in the field offices of the Department of Commerce.

2. These sales be promoted by encouraging local bar associations to publicize the availability of the Manual at these outlets.

3. The Post Office Department be requested to display in local post offices the posters supplied by the Superintendent of Documents advertizing the United States Government Organization Manual.

RECOMMENDATION NO. 12

IT IS RECOMMENDED THAT:

Departments and agencies of the Federal Government engaged in procurement, which have established internal appellate procedures and entities (i.e., boards of contract appeals, boards of review, etc.) which render decisions or opinions concerning disputes under contracts of departments or agencies, afford contractors, in cases where a substantial issue of fact is material to the decision or opinion, the opportunity to know and contest in the appellate proceedings the evidence which supports the position of the contracting officer of the department or agency, and establish and publish appropriate procedures to this end where they are not presently provided.

RECOMMENDATION NO. 13

IT IS RECOMMENDED THAT:

Departments and administrative agencies of the Federal Government which are authorized by law to use the subpena power be encouraged to conform their subpena practices to the following principles where necessary changes can be made without statutory enactment; and where statutory change is necessary to this end, that appropriate legislation embodying these principles be suggested to the Congress for enactment.

1. Power to Issue Subpenas

(1) Officers presiding at adjudicatory hearings should have authority to issue subpenas requiring the attendance of witnesses or the production of evidence, whether or not the proceedings are governed by sections 7 and 8 of the Administrative Procedure Act.

(2) In any investigatory proceeding in which an agency is authorized by law to issue subpenas, the agency, any member of the agency, or any officer designated by it should have authority to issue subpenas requiring the attendance of witnesses or the production of evidence.

2. Geographical Scope

Agency authority to require the attendance of witnesses and the production of evidence at any designated place of hearing should extend throughout the United States or any territory or possession thereof.

3. Issuance to Parties; Quashing

Administrative subpenas for the attendance of witnesses or the production of evidence should be issued upon the request of any party in an adjudicatory proceeding. The issuing authority should have authority to revoke or modify a subpena so issued, upon application made promptly by or on behalf of any person to whom the subpena is directed.

4. Fees

Witnesses summoned before an agency should be tendered or paid by the person or agency at whose instance they appear the same fees and mileage that are paid to witnesses in the courts of the United States.

5. Enforcement

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States within the jurisdiction of which such hearing, investigation, or proceeding is carried on, or in which the person to whom the subpena is addressed is found or resides or transacts business, should have authority to issue an order requiring such person to appear before the agency or member or officer designated by the agency, and give testimony, or produce evidence, or both, touching the matter under investigation or in question. Any failure to obey such order of the court should be subject to punishment by the court as a contempt thereof.

RECOMMENDATION NO. 14

IT IS RECOMMENDED THAT:

There be transmitted to the Interstate Commerce Commission for its further consideration the following proposals relating to licensing of truck operations:

1. That summaries of truck applications be published in the Federal Register as soon as possible after initial filing; and that assignment for processing under oral hearing or no-oral-hearing procedures be postponed until protests are received and evaluated.

2. That direct evidence of applicants and protestants concerning their own operations, services, and proposals be submitted in affidavit form at the time of filing of applications and protests respectively; but that disclosure of the identity of supporting shippers be postponed until the hearing on the merits.

3. That procedures be adopted to assure that applications are not filed without such shipper support as may be necessary, perhaps employing one of the following alternatives:

(a) Requiring that all applications be accompanied by either (1) a statement or affidavit of the applicant's attorney or representative stating that he has in his possession correspondence or statements from shippers promising necessary support of the application, or that shipper support is unnecessary and no supporting shippers will be called, or that, for stated reasons, the documents cannot be obtained; or (2) a similar affidavit from any applicant proceeding without an attorney or representative, with supporting documents transmitted for confidential retention by the Commission; or

(b) Requiring that all applications be accompanied by evidence of shipper support in affidavit form, for confidential retention by the Commission until the oral hearing on the application or until the application is acted upon without oral hearing.

Recommendation No. 14 (Continued)

4. That the shipper statements said to be possessed by the attorney or representative, pursuant to recommendation 3(a), be required to be produced if the application is withdrawn after assignment for hearing or if no supporting shippers are called to testify at the hearing; and that any failure to produce such statements result in disciplinary action against the attorney or representative.

5. That prospective protestants be permitted, with the consent of the applicants, to file notices of pending negotiations in lieu of protests.

6. That responsibility be conferred upon a unit within the Commission to supervise more closely the processing of truck applications. Such a unit might be a Control Committee, consisting of personal assistants of the three Commissioners of Division One and the Director of the Bureau of Operating Rights, or it might be the Director of the Bureau and his aides. In either case, the responsibilities of the unit should include:

(a) Assuring compliance with rules pertaining to applications and protests;

(b) Rejecting inadequate protests and assigning resulting unprotested applications for decision without oral hearing;

(c) Identifying and devising special handling for troublesome, related, or important cases, and making initial determinations on consolidation;

(d) Channeling appeals from examiner decisions either to employee boards or Division One, and inviting industry participation where appropriate.

7. That examiners be empowered to render decisions on the merits in advance of the conclusion of the parties' presentation and issue definitive orders after pre-hearing conferences.

8. That interlocutory review of examiner rulings be limited to matters certified for review either by the examiner or the unit controlling the processing of truck applications (the Control Committee or Bureau Director).

9. That a decision upon review of an initial decision should state either that (1) the findings in the initial decision are adopted in their entirety, or (2) are adopted to the extent they are specifically identified by the review decision, or (3) new and specific findings are substituted for those embodied in the initial decision. A review decision should not state in general terms that the findings below are adopted except to the extent they are inconsistent with the review decision.

RECOMMENDATION NO. 15

IT IS RECOMMENDED THAT:

1. Each agency subject to the Administrative Procedure Act re-examine its rules and practice with regard to the provision in section 6(a) of the Act that "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel," to ensure conformity with the following standards as a minimum in all agency actions and proceedings, including both public and non-public investigations.

a. The right to be "accompanied" by counsel means the right of any person compelled to appear before any agency or agency representative to have counsel present with him during any proceeding or investigation.

b. The right to be "advised" by counsel means that any person compelled to appear in person shall be entitled to the advice in confidence of counsel before, during, and after the conclusion of any agency proceeding or investigation for which his presence is compelled.

c. The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client.

d. In addition, each agency is urged to re-examine its rules and practice and to effect appropriate changes therein to the extent that it determines that it can properly permit persons compelled to appear in person in any agency proceeding or investigation to be examined further for the record by their own counsel following other questioning.

2. The right to counsel be interpreted with a view to preserving the highest concept of administrative fairness and as generously as reasonable administrative efficiency permits. Agencies should recognize that the right to counsel, including, to the extent appropriate, opportunity for cross-examination and production of limited rebuttal testimony or documentary evidence, is particularly important to any person involved in a public investigation where implications of wrongdoing by that person are made a part of the public record.

RECOMMENDATION NO. 16

WHEREAS the Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives,

IT IS RECOMMENDED THAT:

Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add other recommended prohibitions and requirements while others may find it inadvisable to accept all the

recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

1. The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communication about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.

a. The term "on the record proceeding" should be defined as any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing, and any other proceeding which the agency designates by published rule or by order in the particular case as subject to these prohibitions.

By published rule or order in the particular case, each agency should specify which of its proceedings will be governed by the prohibitions against ex parte communications.

b. The prohibitions should apply from the time the agency notices an on-the-record proceeding for hearing or from such earlier time as the agency may fix by published rule, or order in the particular case.

c. Except as provided in d. below, the "ex parte communications" prohibited should include:

(1) Any written communication of any kind about an on-the-record proceeding, if copies thereof are not served by the communicator upon all the parties to the proceeding in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of service.

(2) Any oral communication of any kind about an on-the-record proceeding (i) if advance notice that it will be made is not given by the communicator to all the parties to the proceeding, or (ii) if its contents are not disclosed by the communicator to all the parties at the time of its presentation or promptly thereafter, in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of disclosure.

d. The following classes of "ex parte communications" should not be prohibited.

(1) Any oral or written communication which relates solely to matters which the hearing officer, agency member, or agency employee is authorized by law to dispose of on an ex parte basis.

(2) Any oral or written request for information solely with respect to the status of a proceeding.

(3) Any oral or written communication which all the parties to the proceeding agree, or which the agency or hearing officer formally rules, may be made on an ex parte basis.

(4) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending on-the-record proceeding in which he is interested.

(5) Any oral or written communication made pursuant to an agency practice which is generally known and under which the content of the communication (by way of transcript or otherwise) is promptly available to any person who is a party to a pending on-the-record proceeding which involves any substantive or procedural issue to which the communication may be relevant or who can otherwise show an interest in the communication.

e. The "person who is a party" to whom the prohibitions apply should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, who is named or admitted as a party or who seeks admission as a party.

f. The "person who intercedes in" the proceeding, to whom the prohibitions apply, should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, other than a party, or an agent of a party, who volunteers a communication, which he may be expected to know may advance or adversely affect the interests of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

g. The "agency employee participating in the decision" should include all employees of the agency who themselves make or recommend decisions or who are specifically designated by the agency to assist agency members, hearing officers, or other employees in making or recommending decisions.

Each agency should identify the employees, or classes of employees, who will so participate in the decision in a rule or order published at or before the time when the prohibitions against unauthorized ex parte communications begin to apply to a particular proceeding or class of proceedings or with respect to a particular employee or class of employees.

2. The agency code should prohibit any agency member, hearing officer, or agency employee participating in the decision in an on-the-record proceeding in any agency from (a) requesting or entertaining any unauthorized ex parte communication; and (b) making an unauthorized ex parte communication about the proceeding to any party to the proceeding, any agent of any party, or any other person who he has reason to know may transmit the communication to a party or a party's agent.

Recommendation No. 16 (Continued)

3. The agency code should prohibit any person from soliciting any other person to make an ex parte communication which the solicitor has reason to know is unauthorized.

4. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives a written communication which he knows is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to transmit the communication promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made, if they are not apparent from the communication itself. The Secretary should be required promptly to place the communication and the statement in the public file of the agency, to send copies of the communication to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to send copies of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and placed in the public file where they are available for examination by the parties.

5. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives an oral communication which he knows, at the time it is received, is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to put the substance of the communication in writing and transmit the writing promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made. The Secretary should be required promptly to place the

writing and the statement in the public file of the agency, to send copies of the writing to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to send copies of the writings containing the substance of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and writings containing their substance placed in the public file where they are available for examination by the parties.

6. The agency code should permit all parties to an on-the-record proceeding to request an opportunity to rebut, on the record, any facts or contentions contained in an unauthorized ex parte communication or in any other ex parte communication which the agency official receiving the communication brought to the attention of all the parties in accordance with Recommendation 4 or Recommendation 5 above. The code should provide that the agency will grant such a request whenever it determines that the dictates of fairness so require.

7. The agency code should provide that an agency may censure, or suspend or revoke the privilege to practice before the agency, of any person who makes or solicits the making of, an unauthorized ex parte communication.

8. To the extent permitted by applicable law, the agency code should provide that any relief, benefit or license sought by a party to a proceeding may be denied if the party, or an agent of the party, makes, or solicits the making of, an unauthorized ex parte communication.

9. The agency code should provide that an agency may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal, of any agency employee who violates the prohibitions or requirements of the code.

RECOMMENDATION NO. 17

IT IS RECOMMENDED THAT:

The Conference, acting pursuant to Section 8 of Executive Order 10934, request the executive departments and administrative agencies which conduct administrative proceedings for the determination of private rights, privileges, and obligations to furnish to the Conference (addressing the Chairman of the Committee on Statistics and Reports) information regarding such proceedings in fiscal year 1962. The specific information required will be delineated in a revision of the report form approved under Recommendation No. 1 of the Plenary Session of December 5, 1961. The Conference further directs that the Committee on Statistics and Reports have prepared on the basis of the data received pursuant to this request a second statistical report for distribution to the members of the Conference and the reporting departments and agencies in the same manner as the first statistical report based on the information received under Recommendation No. 1 of the Plenary Session of December 5, 1961.

RECOMMENDATION NO. 18

IT IS RECOMMENDED THAT:

The National Labor Relations Act be amended to provide in substance that a petition for review of a Board decision and order may be filed within 30 days in the appropriate court of appeals by the party seeking review; that if no such petition is filed, the Board shall forthwith file a copy of the Board decision and order in an appropriate circuit court of appeals of the United States and that notice of such filing shall be served upon each respondent; that 15 days shall then be given to each respondent after notice to file objections to the order; and that if no such review is requested within that time, the clerk of the court shall then enter forthwith a decree enforcing the order of the Board.

RECOMMENDATION NO. 19

IT IS RECOMMENDED THAT:

1. Unless special circumstances require a departure in a particular case or classes of cases, the hearing to be accorded in formal proceedings involving the validity or application of rates should be presided over by a hearing examiner qualified under Section 11 of the Administrative Procedure Act. The presiding examiner, armed with the usual powers of a presiding officer, should supervise the building of an adequate record, and, unless special reasons in the particular case require its omission, the presiding examiner should prepare and publish a decision.

2. In order to insure the presentation of all the views and information essential for an accurate and responsible decision, members of the agency's staff should participate in rate cases of general importance. The role of the staff should be to assure fullest practicable development of evidence on the important matters of fact and to focus attention on sound principles of ratemaking with due regard to precedents. It is important, however, that the staff be required, as are other parties, to produce its evidence and state its position at an early point and be treated in all other respects as a party.

3. Federal agencies exercising rate functions should make every effort to reduce the scope and duration of rate proceedings, and perhaps their number as well, by:

a. Requiring rate applicants to support each rate filing of general importance with detailed data justifying the rate.

b. Developing standardized data relating to costs or other matters which would be admissible in rate cases and constitute prima facie proof.

c. Attempting by rulemaking, general policy statements, or the reasoning in opinions to formulate reasonably specific standards or principles to be applied in rate cases.

d. Encouraging negotiated settlement of rate cases primarily through the early presentation of data, staff participation, and the early refinement of issues by the presiding examiner.

4. In order to reduce the time required for completion of the hearing and to improve the quality of the resulting record, federal rate agencies should, to the extent permitted by law:

a. Require the direct case of the party having the burden of proof to be submitted in writing with the rate filing or shortly after the case is designated for hearing.

b. Require the other parties, including the staff and intervenors, to prepare and exchange their direct evidence in written form substantially in advance of the date set for hearing. Rebuttal evidence should also be prepared and exchanged prior to the hearing, subject to the possibility of limited supplemental rebuttal under special circumstances.

c. Empower and encourage the hearing examiner, who should be assigned to the case at an early point, to utilize conference procedures after full preparation by the examiner, the parties and the staff, and in such conferences (1) to make binding determinations of fact where the written evidence submitted in advance or the parties' detailed statements of position discloses that such facts are not seriously disputed, and (2) to require full oral discussion by counsel both to aid the examiner's and the parties' understanding of the issues and to illuminate the extent and degree of conflict in the evidence.

d. Seek, wherever possible, to limit the evidentiary hearing, if one proves necessary, to cross-examination, and require the hearing examiner to limit cross-examination to those critical matters, not already disposed of through prior procedural steps, which are of such character that a trial-type hearing involving interrogation of witnesses would make a useful contribution.

e. Eliminate the "hearing by interludes" which has become customary in rate cases and replace it by a continuous hearing uninterrupted by lengthy recesses.

f. Encourage the hearing examiner, upon his own motion or upon that of any party to the proceeding, to require oral argument either at the conclusion of the hearing or at such later time as may be deemed most useful by the hearing examiner.

5. Because of the complexity and size of major rate proceedings, hearing examiners should have access to specialized advice and assistance of a disinterested nature in analyzing the record, preparing schedules of data, developing ideas, and the like, subject to the following limiting principles:

a. The exclusiveness of the record as the basis of the decision, subject to proper official notice, must be maintained.

b. Off-the-record communications between the presiding examiner and members of the agency's staff who participate in the hearing should be governed by the same principles made applicable to outside participants by Recommendation No. 16, adopted by the Administrative Conference on June 29, 1962.

RECOMMENDATION NO. 20

IT IS RECOMMENDED THAT:

The Federal Aviation Act be amended to clarify the authority of the Civil Aeronautics Board to consolidate, or refuse to consolidate, applications for new or modified domestic route authority for hearing and decision by the Board. The Act should make clear:

1. That contemporaneous consideration of applications, when required, may be accomplished by assigning various of the applications for separate evidentiary hearings and then consolidating them for simultaneous decision by the Board; provided that applicants excluded from a particular hearing are allowed to participate therein as intervenors, adduce evidence, and cross-examine adverse witnesses.

2. That contemporaneous consideration of applications is not required when the Board conducts a proceeding to consider applications for a particular type of service within a defined area or over a described route segment and excludes applications (or portions of applications) not proposing service of the particular type within the area or over the segment so described; provided that new authorizations granted in any such proceeding are subject to a mandatory stop at any point common to any application (or portion of an application) excluded from the proceeding.

3. That the Board is not required to hold a preliminary hearing on the issue of consolidating applications.

RECOMMENDATION NO. 21

IT IS RECOMMENDED THAT:

There be transmitted to the Civil Aeronautics Board for its consideration the following proposals relating to Board proceedings concerned with new or modified domestic route authority. The Board should:

1. Make more particularized findings reflecting the reasons for instituting, or refusing to institute, a route proceeding, with a view to developing factors of general applicability bearing on the Board's responsibility for planning development of the nation's air transportation network.

2. Empower hearing examiners to publish consolidation orders within a limited time after their preparation, except for such internal review as, in individual cases, may be requested by the examiner or directed by the Board.

3. Provide assistance to the Special Counsel for Routes so that internal review of consolidation orders may be more expeditiously completed.

4. Adopt procedures, supplementary to its recent delegation of decisional authority to hearing examiners, which would provide for issuance of notices of review in major

route cases at the time of the Board's consolidation order (or similar procedural step); such notices should make Board review available, at the option of a disappointed party, in all major route cases, while reserving the Board's discretionary authority to review, or decline to review, other route matters.

5. Instruct the Opinion Writing Division, as a general practice, to complete its review of exceptions, briefs and record prior to oral argument, and to supply the Board, in advance of that time, with responses to any questions posed by the Board or its Members and an analysis of the matters which the Board must decide.

6. Instruct Bureau Counsel to emphasize the selection of major policy alternatives in pending cases, and the considerations applicable thereto, rather than the development of a single Bureau "position"; but this should not exclude the expression by Bureau Counsel of a preference, on balance, for one of the several alternatives considered.

7. Eliminate the routine identification of Board opinions with individual Members, while (a) encouraging individual Member responsibility for supervising the preparation of individual opinions, (b) encouraging individual Members to append supplementary personal comments to opinions "by the Board," and (c) providing for personal identification of any majority opinion to which a Board Member has made a substantial individual contribution.

8. Provide for unrestricted consultation between personnel of the Bureau of Economic Regulation and Board decisional personnel at all stages of a route proceeding, except for (a) cases in which Bureau personnel are concerned with establishing prior misconduct by a party, and (b) Bureau counsel of record in the route proceeding and his witnesses.

9. Invite members of the staff to attend Board sessions concerned with route proceedings in which they are involved, including (a) opinion writers and (b) personnel of the Bureau of Economic Regulation not barred from consultation with decisional personnel.

Recommendation No. 21 - Continued

10. Endeavor to establish some measure of contact between the decisional process at the Board level and the Board's hearing examiners, as for example, by (a) encouraging opinion writers to consult with hearing examiners, and (b) informing hearing examiners, through the Chief Examiner, of developments in Board policy relative to their functions.

The consultation recommended in proposals 8, 9 and 10, above, shall not have the effect of enlarging the record or of derogating from the principle that decisions must be based on the record.

RECOMMENDATION NO. 22

IT IS RECOMMENDED THAT:

The following steps should be taken respecting proceedings before the Federal Communications Commission concerned with mutually exclusive applications for broadcast facilities in the same community.

First, the Federal Communications Act should be amended to authorize the Commission to protect the integrity of any comparative selection made on substantive grounds by ascertaining through suitable procedures that a proposed transferee has qualities consistent with the policies reflected in the initial selection.

Second, the Commission should re-examine the conduct of its comparative hearings, under prevailing legislation, with a view to (a) clarifying and improving the criteria employed in their disposition, and (b) to the extent that such clarification and improvement indicates, limiting the scope of such hearing to issues significantly relevant to effectuation of regulatory policies.

Third, the Commission should consider providing by general rule for:

(a) The establishment of a system of priorities under which some applicants would be automatically preferred over others.

(b) The selection of a licensee by some other method in the event that application of present criteria or the recommended system of priorities should result in a determination that two or more applicants are equally qualified.

Any substantial and material issue of fact should, of course, be the subject of an evidentiary hearing by the Commission.

Fourth, to the extent that the Commission requires additional statutory authority to promulgate the general rule referred to in the preceding paragraph, the Communications Act should be amended to confer such authority on the Commission.

RECOMMENDATION NO. 23

IT IS RECOMMENDED THAT:

There be transmitted to the Federal Communications Commission for its consideration the following proposals relating to Commission proceedings concerned with the grant or renewal of broadcast licenses. The Commission should:

1. Discontinue the practice of setting applications for evidentiary hearing where no substantial and material question of fact is presented, particularly in the case of proceedings involving issues as to the engineering characteristics of broadcast facilities, service areas of such stations, and extent of interference between such facilities.

2. Vest in its hearing examiners, to the maximum extent practicable, original authority to decide interlocutory issues relating to a case in hearing status (except petitions to alter issues), and preclude interlocutory review of such rulings except with the concurrence of either (i) the presiding examiner, (ii) the Chief Examiner, or (iii) upon petition in the discretion of the Commission.

3. Fully publicize and subject to some form of public discussion its formulations of programming criteria, including instructions to its own staff and any other criteria that in fact are applied by FCC personnel.

RECOMMENDATION NO. 24

IT IS RECOMMENDED THAT:

1. Each agency should afford to all persons who submit data or evidence, whether acting under agency compulsion or in response to agency request or grant of permission, the right to retain or, on payment of lawfully prescribed costs, to procure a copy of any document submitted by him or a copy of any transcript made of his evidence.

2. The above recommendation should be given statutory form at an appropriate time.

RECOMMENDATION NO. 25

IT IS RECOMMENDED THAT:

1. Each agency having the power to compel testimony should afford the same right to counsel to persons who appear by request or permission of the agency as to those who are compelled to appear.

2. The above recommendation should be given statutory form at an appropriate time.

RECOMMENDATION NO. 26

IT IS RECOMMENDED THAT:

1. In any agency proceeding in which a person is represented by an attorney whose appearance is recognized by the agency with respect to such proceeding, any notice or other written communication required or permitted to be furnished to the client should be mailed to or otherwise served upon or furnished to such attorney (or one of such attorneys if the client is represented by more than one attorney) in such manner as the agency may provide regardless

of whether such communication is furnished directly to the client. Whenever such a communication is mailed to a client, there should be a concurrent mailing to the attorney. When personal service is made on the client, a reasonable delay in furnishing the communication to the attorney is permissible.

2. In any agency proceeding in which a person is permitted by agency rule to be represented by an attorney-in-fact, the agency should comply as far as practicable with the notice provisions in part 1 above.

3. To the extent necessary, each agency should implement the foregoing with appropriate rules defining the proceedings to which it applies and the method by which representation is recognized.

RECOMMENDATION NO. 27

The Administrative Conference has developed improved forms of reports for obtaining meaningful data from executive departments and administrative agencies which conduct administrative proceedings for determination of private rights, privileges, and obligations. Pursuant to section 8 of Executive Order 10934, Recommendation No. 1 of the Plenary Session of December 5, 1961, and Recommendation No. 17 of the Plenary Session of June 29, 1962, the Conference has obtained reports from such departments and agencies relating to their activities in connection with this type of administrative proceeding for the fiscal years 1961 and 1962. The data so obtained have been processed and made available in the form of meaningful statistics to the departments, agencies, and others concerned with the improvement of administrative procedures and the solution of problems relating to undue length of record and protraction of proceedings. Accordingly,

IT IS RECOMMENDED THAT:

1. The study and formulation of reports for gathering data from departments and agencies, with respect to administrative proceedings which are subject to sections 7 and 8 of the Administrative Procedure Act or which are conducted under

comparable procedures involving problems of undue length of record or protraction of proceedings, and the processing and making available of meaningful statistics in aid of formulating informed judgments as to improvement of procedures and solutions of such problems should be continued. Provisions should be made for the funds and staff necessary for the continuance of such work through the Office of Administrative Procedure of the Department of Justice or such other agency as may be designated or created for the purpose. This should insure the availability of such information, over a representative period, to the departments and agencies concerned and others interested in improving the procedures and furthering efficient and effective performance of the functions incident to administrative proceedings.

2. The work of the Conference in the gathering of data and development of meaningful statistics relating to the functions incidental to the conduct of administrative proceedings under procedures of the kind prescribed by the Administrative Procedure Act, where problems of undue length of record and protraction of proceedings are encountered, has laid the initial groundwork for, and indicated the feasibility of, developing meaningful categories of proceedings comparable to those developed by the Administrative Office of the United States Courts relating to judicial proceedings. It is recommended that provision be made for the necessary additional research and study necessary to attain this objective. Achieving this goal will be of substantial aid in allowing comparative analysis of performance under various procedures with a view to affording agencies the benefit thereof as a basis for improvement of procedures.

3. It is recommended that provision be made for analyzing the systems presently used by departments and agencies handling administrative proceedings, in connection with which problems arise concerning length of record or protraction of proceedings, for the gathering of data and processing thereof in aid of effective management and improvement of procedures. The Administrative Conference has gathered information from departments and agencies illustrating: (1) the systems used for the gathering and retention of data regarding the various steps in the handling

of administrative proceedings, and (2) the systems used for making the information and statistics drawn from such data available to those responsible for the efficient and effective performance of functions involved in administrative proceedings. This material will be available and should be analyzed. Further studies should also be made so that all departments and agencies may be informed of the systems adopted by other departments and agencies and the benefits flowing therefrom. In addition, the study and analysis should include consideration of the feasibility of establishing a central data processing system to be available to all agencies concerned with the type of proceedings in question and to serve as an economical and helpful tool in discharging their responsibilities. These measures would inevitably benefit the Government and the public by improved efficiency in the handling of administrative proceedings.

RECOMMENDATION NO. 28

PART I - Advanced Training of Professional Personnel

IT IS RECOMMENDED THAT:

28-1. a. Each regulatory agency provide in its budget submission for the support of a program of advanced training for highly qualified personnel.

b. Each regulatory agency itself undertake the in-service training of its own personnel, on a part-time basis, in the particular problems of its field.

c. The Civil Service Commission call together representatives of Government agencies, private organizations and professional groups to plan a series of short-term training programs for professional staff members of the various regulatory agencies, concentrating on the substantive policy problems of various agencies or groups of agencies.

Recommendation No. 28 - Continued

d. The Civil Service Commission with the advice and collaboration of appropriate educational organizations call together representatives of the major regulatory agencies and help them devise an immediate program for sending a limited number of their most promising career professional staff members to universities for advanced study and research.

e. The Civil Service Commission or any successor organization to the Administrative Conference undertake a study of the long-range problem of the training and education of professional personnel in the regulatory agencies.

PART II - Section 11 Hearing Examiners

IT IS RECOMMENDED THAT:

28-2. a. The hearing examiner program continue to be administered under the standard of a single grade per agency.

b. There be not more than two levels of compensation for hearing examiners in the Federal Service.

c. The determination of the level of compensation of hearing examiners in each agency be made by the Civil Service Commission.

d. There be substantial and prompt increases in compensation paid hearing examiners.

28-3. a. Evaluation of a candidate for a hearing examiner register of eligibles be based upon an analysis of his past record and work, and a written and oral competitive examination.

b. The evaluation of the examinations of candidates be conducted with the participation of lawyers of outstanding ability and experience.

Recommendation No. 28 - Continued

28-4. a. Section 11 of the Administrative Procedure Act be amended to except the appointment of hearing examiners from Section 8 of the Veterans' Preference Act of 1944, and thereafter the Civil Service Commission establish an unranked register of those eligible for appointment.

b. All initial appointments to hearing examiner positions be made from the register.

28-5. The first appointment as a Section 11 hearing examiner be a probationary one and that determination as to successful completion of probation be made by the Civil Service Commission.

28-6. a. Each agency develop and present to each hearing examiner as he begins his duties in that agency an intensive orientation program and at appropriate times in the later course of his tenure such further educational program as may appear desirable.

b. Each agency assign sufficient qualified personnel to develop satisfactory indices and digests of its decisions with current supplements for the benefit of hearing examiners, other interested personnel, and the public.

c. Each agency provide each hearing examiner with adequate clerical-stenographic assistance and office facilities.

d. Each Chief Hearing Examiner exercise increased professional leadership and administration of his respective hearing examiner corps, including --

(i) the exploration of ways and means by which the members of his hearing examiner group can exchange ideas and methods on how it can perform its task better and more efficiently;

(ii) the development of methods by which the members of his group can become better acquainted with agency policy and expertise and

(iii) alertness on his part to provide every helpful service and facility to the members of his corps to enable them to concentrate upon their important, substantive work --

all to the end that each hearing examiner may have a greater professional pride in his position and better serve his agency.

e. Each Chief Hearing Examiner furnish the appropriate office in any successor organization to this Conference informational reports on his efforts and achievements under the preceding recommendation.

28-7. a. The hearing examiner program continue to be administered by the Civil Service Commission under the following commitments made by the Commission: that the program be administered by a separate office or combined with the administration of a legal career service; that this office report to the Commissioners through the Executive Director; that there be an advisory committee composed predominantly of lawyers of distinction; and that the evaluation of candidates for a hearing examiner register of eligibles include a written and an oral competitive examination.

b. Any successor organization to the Conference have as a part of its normal functions the continuous observation and periodic study of the policies and administration of the hearing examiner program.

PART III - Government Attorneys

IT IS RECOMMENDED THAT:

28-8. There be a career service for lawyers in Government which would include appropriate provisions for:

(a) placing original attorney appointments on a career-merit basis;

(b) a merit promotion program for attorneys;

(c) a legal career development program for promising attorneys which would be inter as well as intra-agency;

(d) publication of information regarding vacancies in legal positions so as to facilitate the lateral transfers of attorneys at medium and higher levels and also recruitment from outside of Government into such vacancies.

28-9. Jurisdiction over the legal career service be placed in the Civil Service Commission, provided that it be administered by a separate office or combined with the Office of Hearing Examiners reporting to the Commissioners through the Executive Director, that there be an advisory committee composed predominantly of lawyers of distinction; that any successor organization to the Conference observe and periodically study the policies and administration of the legal career service; and that, to this end, the Conference recommend to the President that legislation be proposed to revoke the prohibition in the current appropriation act for the Civil Service Commission which prohibits the expenditure of appropriated monies for the purpose of examining applicants for attorney positions, and that such prohibition be omitted from future appropriation bills.

28-10. a. The agency programs under which law graduates with a record of high scholastic achievement are appointed at GS-9, rather than at the normal attorney starting grade of GS-7, generally called honor programs, be continued; and that these programs be re-evaluated annually, particularly in terms of the quality of appointees and the turnover among them.

b. In the light of all available information concerning existing honor programs, agencies not now conducting such programs give serious consideration or reconsideration to instituting them.

c. After further experience serious consideration be given to changing the agency-by-agency honor programs into a Government-wide program.

d. Agencies be encouraged to employ as summer interns law students who have completed their second year of law school with creditable records.

e. Beginning attorneys who have taken a bar examination before reporting for work but who have not yet been admitted to the bar be given temporary appointments of nine months at the same entrance grade as other beginning attorneys who have been admitted to the bar.

f. The Civil Service Commission explore the desirability of legislation to authorize the payment of moving expenses of new appointees.

g. The Civil Service Commission explore the possibility of legislation to authorize a certain percentage of professional hiring for the ensuring fiscal year without awaiting the passage of the appropriation bill.

28-11. Each agency supply annually to an appropriate office data pertaining to the appointment, transfer, and separation of attorneys. Subject to the instructions of that office, the data should include:

(a) appointment by grade;
(b) separations by grade;
(c) type of separation by grade, e.g., death, retirement, dismissal, or transfers within the agency, to another agency, or to outside employment.
(d) name, latest address, age, grade and number of years service for each attorney who transferred (intra or inter-agency) or resigned to take a non-government position;
(e) authorized attorney positions by grade, and the number of those positions filled as of October 31 of the preceding year; and the Civil Service Commission conduct a survey of large law firms and corporations to determine the rate of turnover among legal personnel for comparison with the rate among government attorneys.

Recommendation No. 28 - Continued

28-12. The Civil Service Commission standards relating to attorney positions be amended or altered, as necessary, to make clear that attorney positions at the highest grades be available to outstanding attorneys whose duties are of a type most significant to his agency's functions at the highest level of such work, or at a subordinate level if such work is independently done, but without regard to whether or not such work is subject to technical review or whether the attorney has other attorneys under him.

28-13. Congress be requested to establish a reasonable number of supergrade positions at all grades to be dispersed by the Civil Service Commission in the attorney series.

28-14. Eligible candidates for a career legal service be unranked; legislative changes necessary to that end be proposed.

RECOMMENDATION NO. 29

PART I - Procedural Fairness in the Debarment of Contractors

IT IS RECOMMENDED THAT:

29-1. (a) Except as provided in subparagraph (b) below, government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or from participating in any federally assisted construction work should be preceded by (i) notice of proposed debarment to the parties in question, including all affiliated firms sought to be debarred, and (ii) opportunity to such parties to have a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue.

(b) Debarments from government contracts and subcontracts made in conformity with subparagraph (a) above may be applied by other government agencies to their contracting and subcontracting without opportunity for an adversary hearing, but only after notice and opportunity to the parties concerned, including all affiliated firms sought to be debarred, to explain why the debarment should not be so extended in whole or in part.

(c) Notices of proposed debarment should be supported by reasons.

(d) No agency should exclude or remove on grounds of lack of responsibility any individual or firm from any list of qualified persons eligible for government contracts or subcontracts except in conformity with the principles set forth herein and in Recommendation No. 29-2 and Recommendation No. 29-3.

(e) The provisions of this Recommendation No. 29-1 shall not apply to the individual rejection of any bid or proposal, the procedures for which are set forth in Recommendation No. 29-4.

29-2. (a) In cases of criminal conviction or civil judgment affecting an individual's or firm's present responsibility as a government contractor or subcontractor, or upon probable cause for belief that an individual or firm has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility as a government contractor or subcontractor as determined in writing by the agency head or his designee, notice of proposed debarment may also provide for the temporary suspension of the individual or firm from further contracting or subcontracting with the government agency concerned pending administrative determination of the debarment issue. Such suspensions should not exceed a reasonable time, and in no event should they exceed the time limits set forth in subparagraph (b) below.

(b) Any suspension authorized in accordance with subparagraph (a) above, should be subject to the following limitations:

(1) If a notice of suspension and proposed debarment is based in whole or in part upon alleged fraud incident to obtaining or performing a government contract or subcontract or upon any other alleged conduct showing a present lack of integrity or honesty as a government contractor or subcontractor and if within one year of such notice of suspension and proposed debarment the individual or firm concerned has been or is criminally charged by Federal indictment or information or has become or becomes a party to a suit involving the United States or its officers and the subject matter of such indictment, information or suit includes the substance of the reasons set forth in such notice of suspension and proposed debarment, the suspension may continue for the duration of any trial in a Federal court of first instance of the issues covered by such notice of suspension and proposed debarment and for 120 days thereafter (during which period any debarment action should be completed). However, if such indictment, information or suit is not returned or instituted within one year of such notice of suspension and proposed debarment, the suspension should thereupon terminate, but without prejudice to any right of debarment, unless the Attorney General or his designee (but not below the level of an Assistant Attorney General) should determine and

notify the head of the department or agency that issued the notice of suspension and proposed debarment, that disclosure, for purposes of administrative debarment from government contracting, of the Government's evidence of fraud or of lack of honesty or integrity on the part of the individual or firm concerned would be substantially harmful to the Government's law enforcement activities or to the successful criminal or civil prosecution of such individual or firm. If the Attorney General or his designee makes such a determination, the suspension may continue for a period not to exceed 18 months from the notice of suspension and proposed debarment and may continue for the duration of any trial if an indictment, information or suit is returned or instituted within such 18-month period, as provided in the first sentence of this subparagraph (b)(1). If a suspension is made or continued on the basis of such a determination, a further notice of suspension should be furnished to the individual or firm concerned. Nothing in this subparagraph (b)(1) shall prevent the reimposition of a suspension in accordance with subparagraph (a), above, whenever such indictment, information or suit is returned or instituted, in which event the suspension may continue for the duration of any trial as provided in the first sentence of this subparagraph (b)(1), and any administrative trial-type hearing previously begun for the purpose of determining the related debarment issue will thereupon terminate without determination.

(2) If a notice of suspension and proposed debarment is issued for reasons other than those covered by subparagraph (b)(1), above, the period of suspension should not exceed 90 days. Suspension for such other reasons beyond 90 days (but not to exceed an additional 90 days) should not be imposed except upon a written determination by an official of the rank of Assistant Secretary, or the equivalent, of the reasons and necessity therefor; any continuations of such 90-day periods should be accompanied by new determinations of the same kind. A copy of each such determination should be furnished to the suspended individual or firm. In no event should suspension under this subparagraph (b)(2) exceed one year or be in addition to any period of suspension under subparagraph (b)(1), above.

29-3. Except as provided in Recommendation 29-2 and subject to Recommendation 29-4, the practice of summary suspensions of individuals and firms from Government contracting without notice and opportunity for a trial-type hearing should be discontinued.

29-4. Any government rejection of an otherwise successful bid or offer incident to obtaining a government contract or subcontract solely or primarily on the ground that the proposed contractor or subcontractor is believed to be lacking in business integrity or business honesty should be preceded by written explanation to such proposed contractor or subcontractor by the contracting officer of the reasons for that belief and by the opportunity for such proposed contractor or subcontractor to reply to the contracting officer within a reasonable period of time consistent with the need for making a contract or subcontract award in a timely manner.

29-5. Agency rules of procedure and practice in all types of debarments should be published, should be uniform to the extent practicable, and should provide for a fair and speedy determination.

29-6. Government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or firm participating in any federally assisted construction work should be evidenced by a decision in writing, which decision sets forth findings and conclusions as well as the reasons or basis therefor. Such decision should be furnished to the debarred individual or firm. In cases of debarment following a trial-type hearing, all debarment decisions (including decisions to extend debarments in accordance with Recommendation 29-1 (b)) should be published or, in accordance with published rule, made available for public inspection, except those which are required to be held confidential for good cause found by the agency head or his designee and therefore may not be cited as precedents.

PART II - Grounds and Scope of Debarment

IT IS RECOMMENDED THAT:

29-7. (a) All grounds for debarment should be explicitly set forth in appropriate agency regulations, which regulations should be published, and, to the extent practicable and desirable, be uniform.

(b) Such regulations should to the extent feasible set forth standards and criteria for (i) determining business affiliates of debarred firms and individuals, (ii) extending debarment to such affiliates, (iii) determining when fraud or criminal conduct of an owner, stockholder, officer, director, or employee will be imputed to a business firm or when termination of such person's relationship to the firm will avoid or remove debarment of the firm, and (iv) determining the scope of administrative debarments in terms of their applicability to all agency contracts or subcontracts with the debarred firm or individual or to particular types of contracts or subcontracts, or to contracts or subcontracts for particular products or services.

(c) The grounds for administrative debarment should include, without limitation, fraud incident to obtaining or performing a government contract or subcontract or any other conduct showing a serious and present lack of business integrity or business honesty as a government contractor or subcontractor. Findings of such fraud or other conduct should be based on substantial evidence which may include a criminal or civil judgment or any findings of fact therein relating materially to the grounds of debarment.

Recommendation No. 29 (Continued)

PART III - Debarment Periods

IT IS RECOMMENDED THAT:

29-8. The Armed Services and Federal Procurement Regulations and the regulations of the Secretary of Labor issued pursuant to the Reorganization Plan No. 14 of 1950 (i) should be amended to provide that, except as otherwise provided by statute or Executive order, debarment should be for a reasonable, definitely stated period of time, commensurate with the seriousness of the cause therefor, but not to exceed 3 years, and (ii) should expressly provide for removal of debarment within the debarment period upon a showing of current responsibility to perform government contracts or subcontracts or to participate in federally assisted construction work, as the case may be.

29-9. Congress should be requested to amend the Buy American and Davis-Bacon Acts to remove the absolute debarment penalties and to authorize administrative discretion with regard to the scope of debarment and to the period of debarment in conformity with the principles set forth in Recommendation 29-8 above.

RECOMMENDATION NO. 30

IT IS RECOMMENDED THAT:

The Conference approves the principle of discovery in adjudicatory proceedings and recommends that each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings.

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